TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 193.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED NOVEMBER 9, 1909.

(18,308.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 186.

THE OREGON AND CALIFORNIA RAILROAD COMPANY APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 10, 1902.

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1 United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2272.

Citation.

To the United States, Greeting:

The Oregon & California Railroad Company having, on this day, been granted an order of appeal to the United States circuit court of appeals for the ninth circuit, from the decree entered June 15th, 1900, in suit No. 2,272, in the circuit court of the United States for the district of Oregon, brought by The United States as complainant against the said company; and the bond on appeal of the said company having been this day filed and approved:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit, at San Francisco, California, on September 3d, 1900, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

2 Given under my hand, at Portland, Oregon, on August 11th, 1900.

CHARLES B. BELLINGER, *Judge.*

Due service admitted on August 11th, 1900.

JOHN H. HALL,
United States Attorney, District of Oregon.

Due service admitted Aug. 22, 1900.

CHAS. J. SCHNABEL,
Attorney for Intervenors and Settlers.

(Endorsed:) No. 2,272. United States circuit court of appeals, ninth circuit. United States *vs.* Oregon & California Railroad Co. Citation. United States circuit court. Filed Aug. 11, 1900. J. A. Sladen, clerk, district of Oregon. Wm. D. Fenton, Portland, Or., and Wm. Singer, Jr., N. E. corner Second and Mission streets, San Francisco, Cal., att'ys for appellant.

In the Circuit Court of the United States for the District of Oregon, October Term, 1895.

Be it remembered, that on the 31st day of January, 1896, there was duly filed in the circuit court of the United States for the district of Oregon, a bill of complaint, in words and figures as follows, to wit:

3 In the Circuit Court of the United States for the District of Oregon. In Equity.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant.

Bill of Complaint.

To the honorable judge- of the circuit court of the United States for the district of Oregon, sitting in equity:

The United States of America, by Judson Harmon, its Attorney General, brings this, its bill of complaint, against The Oregon & California Railroad Company, a corporation, organized under and by virtue of the laws of the State of Oregon, and a citizen of said State and district, and complaining says:

I.

That the Congress of the United States, by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon," approved July 25, 1866, authorized such company, organized under the laws of Oregon as the legisla-
4 ture of said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland and running thence through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon, there to connect with another railroad authorized in said act to be built in the State of California, and granted to said Oregon Company every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, ten on each side of said railroad, and when any of said alternate sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate section-, and as soon as the said company should file in the office of the Secretary of the Interior a map of survey of said railroad, or any portion thereof not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale public lands therein granted on each side of said railroad, so far as located and within the limits above specified; and your orator shows that by a joint resolution adopted October 20, 1868, of the legislature of the State of Oregon, the Oregon Central Railroad Company was designated, in accordance with said last-mentioned act of Congress

as capable of receiving and undertaking the privileges, fran-
5 chises, grants and duties above set forth, and did become the corporation entitled to all the benefits and subject to all the obligations of said act of Congress, and that on or about April 4, 1870, the said Oregon & California Railroad Company, a corporation, duly organized under the laws of Oregon, became the successor and assign of said Oregon Central Railroad Company.

II.

And your orator would further show unto your honors that on the 26th day of March, 1870, the officers of the Oregon & California Railroad Company definitely fixed the line of said railroad authorized by said act of Congress, and filed a plat thereof in the office of the Commissioner of the General Land Office, and presented the same to the then Secretary of the Interior, showing among other things, a route along the line authorized by said act of Congress, approved July 25, 1866, and the Secretary of the Interior did, on said 26th day of March, 1870, in due form, accept said map and directed the withdrawal of the lands opposite the line in question, and the following-described, among other lands in the State of Oregon, were odd-numbered sections or parts of odd-numbered sections of public lands, not mineral, without the place limits and within the indemnity limits of said proposed line of railroad as designated by said map and within the limits of the withdrawal ordered, viz: The north half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section five (5), township fifteen (15) south, range eight (8) west, and the west half of the southeast quarter, and
6 the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, and the northeast quarter of the southeast quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, and the northeast quarter of the northwest quarter, and the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, and the south half of the southeast quarter, and the northwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of section thirty-three (33), township fourteen (14) south, range eight (8) west, and the southeast quarter of the northeast quarter of section five (5), township fifteen (15) south, range eight (8) west, and the northwest quarter of the northeast quarter of section seven (7), township fourteen (14) south, range eight (8) west, and the north half of the northwest quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, and the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section nine (9), township fifteen (15) south, range eight (8) west, and the west half of the northeast quarter and the northwest quarter of the southeast quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, and the south half of the southwest quarter and the northwest quarter

of the southwest quarter of section five (5), township fifteen (15) south, range eight (8) west, and the south half of the southeast quarter, and the northeast quarter of the southeast quarter,
7 and the southeast quarter of the northeast quarter of section twenty-seven (27), township twenty-seven (27) south, range eleven (11) west, and the north half of the northwest quarter of section seven (7), township fifteen (15) south, range eight (8) west, of the Willamette meridian.

III.

And your orator would further show unto your honors that on the 15th day of August, 1887, the then Secretary of the Interior, by a departmental order, revoked the said withdrawal of March 26, 1870, and in and by the terms of said revocation order restored the lands above described to the public domain and threw them open for the benefit of homestead and pre-emption entries.

IV.

And your orator would further show unto your honors that the Congress of the United States, by an act entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department," approved April 21, 1876, provided, among other things, "that all pre-emption and homestead entries or entries in compliance with any law of the United States of the public lands made in good faith by settlers upon tracts of land of not more than one hundred and sixty acres within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant, was received at the local land office of the district in which such lands were situated, or after their restoration to market by order of the General
8 Land Office, and where the pre-emption and homestead laws have been complied with and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed and patents for the same shall issue to the parties entitled thereto."

V.

And your orator would further show unto your honors that the final plats of township fourteen (14) and fifteen (15) south, range eight (8) west, of Willamette meridian, were filed in the district land office at Roseburg, Oregon, on the 19th day of October, 1892.

VI.

And your orator would further show unto your honors that the official plats of survey of township twenty-seven (27) south, range eleven (11) west, were filed in the district land office at Roseburg, Oregon, on the 16th day of August, 1892.

VII.

And your orator would further show unto your honors that all of the tracts above described in said township fourteen (14) south, range

eight (8) west, were embraced by indemnity list number twenty-eight (28) of selections of the Oregon & California Railroad Company, which was approved by the district land officers at Roseburg, Oregon, on October 19, 1892.

VIII.

And your orator would further show unto your honors that all of the tracts described in said township fifteen (15) south, range eight (8) west, were embraced by indemnity list number twenty-
9 nine (29) of selections of the Oregon & California Railroad Company, which was approved by the district land officers at Roseburg, Oregon, on October 19, 1892.

IX.

And your orator would further show unto your honors that all of the tracts above described in said township twenty-seven (27) south, range eleven (11) west, were embraced by indemnity list number twenty-seven (27) of selections of the Oregon & California Railroad Company, which was approved by the district land officers at Roseburg, Oregon, on the 16th day of August, 1892.

X.

And your orator would further show unto your honors that on the — day of October, 1878, John Sapp, a duly qualified homestead entryman under the laws of the United States of America, settled upon the north half of the northwest quarter of section seven (7), township fifteen (15) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever since said — day of October, 1878, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $1,500, and that on the 22d day of October, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said John Sapp, in good faith, made application for filing a homestead, covering
10 said north half of the northwest quarter of section seven (7), township fifteen (15) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

XI.

And your orator would further show unto your honors that on the 28th day of May, 1885, Baxter W. Jenkins, a duly qualified homestead entryman under the laws of the United States of America, settled upon the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section nine (9), township fifteen (15) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever

since said 28th day of May, 1885, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $1,500, and that on the 3d day of November, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said Baxter W. Jenkins, in good faith, made application for filing a homestead, covering said southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section nine (9), township fifteen (15) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

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XII.

And your orator would further show unto your honors that on the — day of October, 1869, Charles Heller, a duly qualified homestead entryman under the laws of the United States of America, settled upon the south half of the southeast quarter, and the northeast quarter of the southeast quarter, and the southeast quarter of the northeast quarter of section twenty-seven (27), township twenty-seven (27) south, range eleven (11) west, of the Willamette meridian, with the intention of homesteading the same, and ever since said — day of October, 1869, and up to the — day of October, 1889, the day of his death, he continued to reside upon and to cultivate the same, and that after his death his widow and children continued to live upon said land, and that he and his said wife and children have made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which improvements aggregate in round numbers the sum of $3,000, and that on the 25th day of October, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, Charles Heller, Jr., one of the sons and heirs-at-law of the said Charles Heller, deceased, duly tendered his filing for the benefit of all the heirs-at-law of said Charles Heller, deceased, as a homestead, covering said south half of the southeast quarter, and the northeast quarter of the southeast quarter, and the southeast quarter of the northeast quarter of section twenty-seven (27), township twenty-seven (27) south, range
12 eleven (11) west, of the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

XIII.

And your orator further shows unto your honors that on the — day of September, 1889, Charles S. Seely, a duly qualified homestead entryman under the laws of the United States of America, settled upon the north half of the northwest quarter of section nineteen (19) township fourteen (14) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever since the — day of September, 1889, has continued to reside upon said land and to cultivate the same, and has made im-

provements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $700, and that on the 12th day of November, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said Charles S. Seely, in good faith, made application for filing a homestead, covering said north half of the northwest quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office, in the State and district of Oregon.

XIV.

And your orator would further show unto your honors that on the — day of ——, 1878, J. R. Peters, a duly qualified home-
13 stead entryman under the laws of the United States of America, settled upon the northwest quarter of the northeast quarter of section seven (7), township fourteen (14) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever since said — day of ——, 1878, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $1,500, and that on the 22d day of October, 1892, and within ninety days from the date of filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said J. R. Peters, in good faith, made application for filing a homestead, covering said northwest quarter of the northeast quarter of section seven (7), township fourteen (14) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

XV.

And your orator would further show unto your honors that on the — day of September, 1878, Joseph A. Cox, a duly qualified homestead entryman under the laws of the United States of America, settled upon the south half of the southeast quarter, and the northwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of section thirty-three (33), township fourteen (14) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever since said
14 — day of September, 1878, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $300, and that on the 22d day of October, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said Joseph A. Cox, in good faith, made application for filing a homestead, covering said south half of the southeast quarter and the northwest quarter of the southeast

quarter, and the southeast quarter of the southwest quarter of section thirty-three (33), township fourteen (14) south, range eight (8) west, of the Willamette meridian at the Roseburg land office in the State and district of Oregon.

XVI.

And your orator would further show unto your honors that on the 15th day of October, 1889, John W. Carey, a duly qualified homestead entryman under the laws of the United States of America, settled upon the northeast quarter of the northeast quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever since said 15th day of October, 1889, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $500, and
15 that on the 27th day of October, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said John W. Carey, in good faith, made application for filing a homestead, covering said northeast quarter of the *southeast* quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, af the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

XVII.

And your orator would further show unto your honors that on the — day of July, 1883, Uriah W. Wren, a duly qualified homestead entryman under the laws of the United States of America, settled upon the west half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever since said — day of July, 1883, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $2,000, and that on the 22d day of October, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg,
16 Oregon, the said Uriah W. Wren, in good faith, made application for filing a homestead, covering said west half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

XVIII.

And your orator would further show unto your honors that on the — day of ——, 1878, Abram M. Peek, a duly qualified homestead entryman under the laws of the United States of America, settled upon the north half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever since the said — day of ——, 1878, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $1,700, and that on the 22d day of October, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said *Uriah W. Wren*, in good faith, made application for filing a homestead, covering said north half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

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XIX.

And your orator would further show unto your honors that on the 10th day of August, 1890, Alfred R. Young, a duly qualified pre-emption entryman under the laws of the United States of America, settled upon the outheast quarter of the northeast quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian, with the intention of pre-empting the same, and ever since said 10th day of August, 1890, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $1,200, and that on the 9th day of December, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office of Roseburg, Oregon, the said Alfred R. Young, in good faith, made application for filing a pre-emption, covering said southeast quarter of the northeast quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office, in the State and district of Oregon.

XX.

And your orator would further show unto your honors that on the 26th day of April, 1890, Francis W. Huddleston, a duly qualified homestead entryman under the laws of the United States of America, settled upon the west half of the northeast quarter and the

northwest quarter of the southeast quarter of section nine-
18 teen (19), township fourteen (14) south, range eight (8) west,
of the Willamette meridian, with the intention of homestead-
ing the same, and ever since said 26th day of April, 1890, has continued to reside upon said land and to cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $800, and that on the 12th day of November, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said Francis W. Huddleston, in good faith, made application for filing a homestead, covering said west half of the northeast quarter, and the northwest quarter of the southeast quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

XXI.

And your orator would further show unto your honors that on the — day of July, 1885, Charles E. Banton, a duly qualified homestead entryman under the laws of the United States of America, settled upon the northeast quarter of the northwest quarter, and the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-five (25), township fourteen (14) south, range eight west, of the Willamette meridian, with the intention of homesteading the same, and ever since said — day of July, 1885, has
continued to reside upon said land and to cultivate the same,
19 and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $1,500, and that on the 22d day of October, 1892, and within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said Charles E. Banton, in good faith, made application for filing a homestead, covering said northeast quarter of the northwest quarter, and the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office, in the State and district of Oregon.

XXII.

And your orator would further show unto your honors that on the — day of October, 1878, George C. Peek, a duly qualified homestead entryman under the laws of the United States of America, settled upon the south half of the southwest quarter and the northwest quarter of the southwest quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian, with the intention of homesteading the same, and ever since said — day of October, 1878, has continued to reside upon said land and to

cultivate the same, and has made improvements thereon in the way of dwellings, barns, outhouses, fencing, clearing and planting of fruit trees thereon, which said improvements aggregate in round numbers the sum of $1,500, and that on the 22d day of October, 1892, and within ninety days from the date of the filing of
20 the township plat of the survey of said lands in the district land office at Roseburg, Oregon, the said George C. Peek, in good faith, made application for filing a homestead, covering said south half of the southwest quarter, and the northwest quarter of the southwest quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian, at the Roseburg land office in the State and district of Oregon.

XXIII.

And your orator would further show unto your honors that said indemnity lists Nos. 27, 28 and 29 of selections made by the Oregon & California Railroad Company were duly presented to the General Land Office at the Capital in Washington, and thereafter to the Secretary of the Interior, and that at the time of said presentation of said lists at said General Land Office and to the said Secretary of the Interior, no knowledge of the adverse claims of said Charles E. Banton, Alfred R. Young, Francis W. Huddleston, Uriah W. Wren, Abram M. Peek, John W. Carey, Joseph Cox, Charles Seeley, Charles Heller, J. R. Peters, Baxter W. Jenkins, John Sapp and George C. Peck were known to said General Land Office or to said Secretary of the Interior, and thereupon and without any knowledge of said adverse claims on the part of said parties above mentioned, the said General Land Office and the said Secretary of the Interior in due form approved of said indemnity lists of selections, and thereafter, and on February 20, 1892, a patent was duly issued to the Oregon & California Railroad Company for the following-described lands, to wit:

21 The north half of the northwest quarter of section seven (7), township fifteen (15) south, range eight (8) west, of the Willamette meridian; the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section nine (9), township fifteen (15) south, range eight (8) west, of the Willamette meridian; the south half of the southeast quarter and the northeast quarter of the southeast quarter, and the southeast quarter of the northeast quarter of section twenty-seven (27), township twenty-seven (27) south, range eleven (11) west, of the Willamette meridian; the north half of the northwest quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the northwest quarter of the northeast quarter of section seven (7), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the south half of the southeast quarter and the northwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of section thirty-three (33), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the northeast quarter of the southeast quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, of

the Willamette meridian; west half of the southeast quarter and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the north half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section five (5), township fifteen (15) south, range
22 eight (8) west, of the Willamette meridian; the southeast quarter of the northeast quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian; the west half of the northeast quarter and the northwest quarter of the southeast quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the northeast quarter of the northwest quarter, and the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the south half of the southwest quarter and the northwest quarter of the southwest quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian.

But your orator avers that the ministerial officers of your orator acted erroneously and contrary to law in issuing a patent to the defendant, The Oregon & California Railroad Company, for the lands described herein under the facts as stated herein, and so your orator avers that said patents are void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

XXIV.

And your orator further shows that the Congress of the United States by an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned land and for other purposes," approved March 3, 1887, directed and authorized the Secretary
23 of the Interior to adjust all grants theretofore unadjusted, and if it should appear that any lands had been erroneously patented to any railroad company to make demand for relinquishment or reconveyance, and if such company should refuse to reconvey within ninety days then it should be the duty of the Attorney General to commence and prosecute in the proper court the necessary proceedings to cancel such patents and restore title to the United States. And your orator avers that on the 27th day of October, 1893, the total grant of lands in the State of Oregon, under said act of July 25, 1866, to said Oregon Central Railroad Company, to the rights of which said Oregon & California Company has succeeded as aforesaid, was unadjusted and the Secretary of the Interior regarding the said patents to the above-described lands as erroneously issued, directed the Commissioner of the General Land Office to request reconveyance as provided by statute and in accordance with such directions the Commissioner of the General Land Office did on said 27th day of October, 1893, make demand

of the said railroad company by a letter addressed to C. P. Huntington, president of the Southern Pacific Company, owning and controlling the land grant for said Osegon & California Railroad Company, for the reconveyance of said above-described lands, and your orator avers that no response has been made to said demand for reconveyance as requested, and that said defendant company has refused and still refuses to so reconvey said land.

Forasmuch, therefore, as your orator is without adequate remedy in a court of law and to the end that the said defendant com-
24 pany may, if it can, show why your orator should not have the relief herein prayed, and that matters herein may be determined according to equity and good conscience, your orator brings this suit, and prays that the patent purporting to convey title to said above-described lands may be set aside, canceled and decreed null and void; and your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this court, directed to the defendant, The Oregon & California Railroad Company, commanding it, on a certain day and under a certain penalty therein to be specified, personally to be and appear in this court, and then and there to answer, but not under oath (an answer under oath being hereby expressly waived herein), and to abide such order and decree as to your honors may seem proper.

JUDSON HARMON,
Attorney General of the United States.
DANIEL R. MURPHY,
United States Attorney.
CHAS. J. SCHNABEL,
Assistant United States Attorney.

Filed January 31, 1896.

J. A. SLADEN, *Clerk.*

25 And afterward, to wit, on the 31st day of January, 1896, there was issued out of said court a *subpœna ad respondendum*, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Subpœna ad Respondendum.

The President of the United States of America to The Oregon and California Railroad Company, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room

thereof, in the city of Portland, in said district, on the first Monday of March next, which will be the 2d day of March, A. D. 1896, to answer the exigency of a bill of complaint exhibited and
26 filed against you in our said court, wherein The United States is complainant and you are defendant, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpœna, and to have then and there the same.

Hereof fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 31st day of January, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States, the one hundred and —.

[Seal of the U. S. Circuit Court for the District of Oregon.]

J. A. SLADEN, *Clerk*,
By G. H. MARSH,
Deputy Clerk.

Memorandum Pursuant to Equity Rule No. 12 *of the Supreme Court of the United States.*

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso.*

27 *Return to Subpœna ad Respondendum.*

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I hereby certify that I served the annexed *subpœna ad respondendum*, in Portland, Multnomah county, in said district on the 1st day of February, 1896, on the therein-named defendant, The Oregon and California Railroad Company, by delivering a copy thereof, prepared and certified to by me as United States marshal, together with a copy of the complaint, in the therein-entitled suit certified to by Daniel R. Murphy, United States district attorney, to R. Koehler, the general manager of the Southern Pacific Railroad Company, said company being the successor of the said Oregon and California Railroad Company, the defendant herein named.

H. C. GRADY,
United States Marshal,
By GEO. HUMPHREY, *Deputy.*

(Endorsed:) No. 2,272. In the circuit court of the United States, for the district of Oregon. In equity. The United States *vs.* The Oregon and California Railroad Company. *Subpœna ad respondendum.* Returned and filed February 1, 1896. J. A. Sladen, clerk.

28 And afterward, to wit, on the 2d day of March, 1896, there was duly filed in said court a præcipe for appearance of defendant, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2272.

Præcipe for Appearance of Defendant.

To the clerk of the above-entitled court:

You will please enter our appearance as solicitors in the above-entitled cause for the defendant, The Oregon and California Railroad Company.

BRONAUGH, McARTHUR, FENTON & BRONAUGH.
E. C. BRONAUGH.
L. L. McARTHUR.
W. D. FENTON.
E. C. BRONAUGH, JR.

Filed and entered March 2, 1896.

J. A. SLADEN, *Clerk.*

29 And afterward, to wit, on the 14th day of March, 1896, there was duly filed in said court a stipulation extending time to plead in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Stipulation Extending Time to Plead.

It is hereby stipulated by and between the complainant and the defendant in the above-entitled cause, by their respective solicitors, that the defendant may have sixty days' time on and after April 6th, 1896, in which to plead, answer or demur to the bill of complaint in the above-entitled cause.

DANIEL R. MURPHY,
United States Attorney and Solicitor for Complainant.
BRONAUGH, McARTHUR, FENTON & BRONAUGH, *Solicitors for Defendant.*

Filed March 14, 1896.

J. A. SLADEN, *Clerk.*

30 And afterward, to wit, on Saturday, the 14th day of March, 1896, the same being the 135th judicial day of the regular October term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES *vs.* THE OREGON & CALIFORNIA RAILROAD COMPANY.	No. 2272. March 14, 1896.

Order Allowing Time to Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendant, and it appearing to the court that a stipulation of the parties hereto has heretofore been filed in this cause agreeing hereto, it is ordered that said defendant be, and it is hereby, allowed sixty days' time on and after Monday, April 6, 1896, in which to plead, answer, or demur to the bill of complaint herein.

31 And afterward, to wit, on Monday, the 6th day of April, 1896, the same being the 154th judicial day of the regular October, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES *vs.* THE OREGON & CALIFORNIA RAILROAD COMPANY.	No. 2272. April 6, 1896.

Order Extending Time to File Answer.

Now, at this day, on motion of Mr. Daniel R. Murphy, United States attorney, it is ordered that the defendant in the above-entitled cause be, and it is hereby, allowed sixty days from this date in which to file its answer herein.

32 And afterward, to wit, on the 20th day of May, 1896, there was duly filed in said court, a stipulation extending time to plead, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Stipulation Extending Time to Plead.

It is hereby stipulated by and between the complainant and defendant in the above-entitled suit that the time to plead may be enlarged and extended to and including July 6th, 1896.

DANIEL R. MURPHY,
United States Attorney and Solicitor for Complainant.
BRONAUGH, McARTHUR, FENTON & BRONAUGH, *Solicitors for Defendant.*

Filed May 20, 1896.

J. A. SLADEN, *Clerk.*

33 And afterward, to wit, on Wednesday, the 20th day of May, 1896, the same being the 33d judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Co. } No. 2272. May 20, 1896.

Order Extending Time to Plead.

Now, at this day, upon stipulation of the parties filed herein, and on motion of Mr. W. D. Fenton, of counsel for the defendant, it is ordered that said defendant be, and it is hereby, allowed until Monday, July 6, 1896, in which to plead this cause.

34 And afterward, to wit, on Tuesday, the 23d day of June, 1896, the same being the 62d judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Company. } No. 2272. June 23, 1896.

Order Extending Time to Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendant, it is ordered that the time heretofore granted in which the defendant may plead in this cause be, and the same is hereby, extended to Monday, August 3, 1896.

35 And afterward, to wit, on the 23d day of July, 1896, there was duly filed in said court a stipulation extending time to plead, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Stipulation Extending Time to Plead.

It is hereby stipulated by and between plaintiff and the defendant in the above-entitled suit that the defendant may have thirty days from this date within which to move or plead to the bill of complaint herein.

Dated at Portland, Oregon, this 23d July, 1896.

CHAS. J. SCHNABEL,
Of Attorneys for United States.
L. L. McARTHUR,
Of Attorneys for Defendant.

Filed July 23, 1896.

J. A. SLADEN, *Clerk.*

36 And afterward, to wit, on the 22d day of August, 1896, there was duly filed in said court an answer, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon. In Equity.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Answer.

The answer of the defendant, Oregon and California Railroad Company, to the complainant's bill of complaint herein.

The defendant, Oregon and California Railroad Company, now and at all times saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, or imperfections in the said bill of complaint, for answer thereto, or to so much thereof as the defendant is advised it is material or necessary for it to make answer to, answering:

37 I.

It admits and avers that the Congress of the United States, by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California, to Portland, in Oregon," approved July 25th, 1866, authorized and empowered such company, organized under the laws of Oregon as the legislature of said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly, through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon, where the same should connect with another railroad which the said act authorized to be constructed in the State of California. That the said act granted to the said Oregon Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and provided that when any of said alternate sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid, should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of the said first-named alternate sections; and

38 provided that as soon as the said company should file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior should

withdraw from sale the public lands therein granted on each side of the said railroad, as far as located and within the limits specified.

And the defendant says that the Oregon Central Railroad Company is, and ever since April 22d, 1867, has been, a corporation, duly organized and existing by and in virtue of the laws of Oregon. That the legislature of the State of Oregon, by its joint resolution entitled "Senate joint resolution No. 16, relating to the railroad land grant from the Central Pacific railroad in California, to Portland, Oregon," adopted October 20th, 1868, duly designated the said Oregon Central Railroad Company as the company entitled to receive the lands granted in Oregon, and the benefits and privileges conferred by the said act of July 25th, 1866; and the defendant admits that the said company became the corporation entitled to all the benefits in Oregon, and subject to all the obligations, of the said act of Congress.

The defendant says that it is, and ever since March 17th, 1870, has been a corporation duly organized and existing by and in virtue of the laws of Oregon; and admits and avers that on or about April 4th, 1870, it became the successor and assign of the said Oregon Central Railroad Company, and entitled to all the privileges, benefits, and grants in Oregon provided by the said act of July 25th, 1866.

39 II.

Further answering the defendant says that on or about ——, 1869, and within the time allowed by the act of Congress, approved April 10th, 1869, entitled "An act to amend an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California, to Portland, in Oregon,' approved July twenty-five eighteen hundred and sixty-six," the said Oregon Central Railroad Company duly filed in the Department of the Interior its assent to the said act of Congress of July 25th, 1866.

The said Oregon Central Railroad Company, prior to the month of October, 1869, definitely located and surveyed the first section of the railroad in Oregon provided for by the said act of July 25th, 1866, which section of railroad extended from Portland to a point at or near Jefferson, and comprised not less than sixty continuous miles from the northern terminus thereof; and on October 29th, 1869, the said company filed in the office of the Secretary of the Interior, and the Secretary of the Interior duly accepted and approved, a map of the survey of the said first section of railroad. Prior to the month of March, 1870, the said company definitely located and surveyed the second section of the said railroad, which section of railroad extended from the said point at or near Jefferson, to a point near the southeast corner of section 35, in township 27 south, range 6 west, Willamette meridian, and comprised not less than one hundred and twenty continuous miles of railroad
40 from Jefferson; and on March 26th, 1870, the said company filed in the office of the Secretary of the Interior, and the Secretary of the Interior duly accepted and approved, a map of the survey of the said second section of railroad. On January 31st,

1870, the Commissioner of the General Land Office, by direction of the Secretary of the Interior theretofore made, withdrew all the odd-numbered sections within thirty miles on each side of the railroad shown on the said map of survey filed October 29th, 1869, from sale or location, pre-emption or homestead entry, notice of which withdrawal was received at the local land office for the Oregon City district (within which district the said lands were situated) on February 16th, 1870; and on April 7th, 1870, the Commissioner of the General Land Office, by direction of the Secretary of the Interior made on March 26th, 1870, withdrew all the odd-numbered sections within thirty miles on each side of the railroad shown on the said map of survey filed on March 26th, 1870, from sale or location, pre-emption or homestead entry, notice of which withdrawal was received at the local land office for the Oregon City district on April 28th, 1870, and at the local land office for the Roseburg district (within which two districts the said lands were situated) on April 25th, 1870. All of the lands withdrawn as aforesaid have ever since remained so withdrawn by virtue of the said withdrawals and the provisions of the said act of July 25th, 1866.

The said Oregon Central Railroad Company and this defendant duly comp-eted and equipped the said first section of railroad along the line shown on the map of survey filed October 29th, 1869,
41 and had the same ready for the service contemplated by the act of July 25th, 1866, prior to November 6th, 1870; and three commissioners, duly appointed by the President of the United States for that purpose, examined the same and on or about ——, 1870, duly reported, under oath, to the President of the United States, that the said section of railroad had been completed and equipped in all respects as required by the said act, and that the same was ready for the service contemplated by the said act, which report was, on or about February 28th, 1871, duly accepted and approved by the President of the United States. The said second section of railroad was duly completed and equipped along the line shown on the map filed March 26th, 1870, and made ready for the service contemplated by the act of July 25th, 1866, prior to December 3d, 1872, by the defendant; and three commissioners, duly appointed by the President of the United States for that purpose, examined the same, and on and before December 27th, 1876, duly reported, under oath, to the President of the United States that the said section of railroad had been completed and equipped in all respects as reqired by the said act, and that the same was ready for the service contemplated by the said act, which report was, on and before July 11th, 1878, duly accepted and approved by the President of the United States. Prior to the year 1885 the defendant duly completed and equipped the entire railroad in Oregon contemplated and provided for by the said act of July 25th, 1866, and had the same ready for the service contemplated by the said act; and commissioners, duly appointed by the President of the
42 United States for that purpose, examined the same and duly reported, under oath, to the President of the United States, that the same had been completed and equipped in all respects as

required by the said act, and that the same was ready for the service contemplated by the said act, and such reports were duly accepted and approved by the President of the United States.

The defendant admits and avers that the lands described in subdivision II of the bill of complaint herein are distant more than twenty miles from, but lie within thirty miles of the railroad shown on the said map filed March 26th, 1870, and are distant more than twenty miles from, but lie within thirty miles of, the said second section of railroad completed, equipped and accepted as aforesaid; and that none of the said lands are mineral lands, nor included by any exception to or reservation from the lands in Oregon granted by the said act of July 25th, 1866, and that all of the said lands are within the limits of the withdrawal made on March 26th, 1870.

III.

The defendant admits that on August 15th, 1887, the then Secretary of the Interior, by a departmental order, declared the said withdrawal of March 26th, 1870, revoked as to the lands within the indemnity limits; and that in and by the terms of said revocation order, in so far as he had the power or authority so to do, the Secretary restored the lands described in subdivision II of the bill of complaint to the public domain, and threw them open for the benefit of pre-emption and homestead entries. But the defend-
43 ant denies that the said revocation order restored any of the said lands to the public domain, or threw any of the said lands open to pre-emption or homestead entries; and says that on March 26th, 1870, by force and virtue of section 2 of the said act of July 25th, 1866, all of the lands described in the bill of complaint were reserved from the public domain, for the benefit of the land grant made by the said act, and withdrawn from pre-emption and homestead entries, and have ever since remained so reserved and withdrawn.

IV.

The defendant admits that the Congress of the United States, by the act mentioned in subdivision IV of the bill of complaint, provided as is in the said act set forth; but says that the said act did not in anywise affect its (the defendant's) right, title or interest in or to any of the lands described in subdivision II of the bill of complaint.

V.

The defendant admits that the official plat of survey of township 27 south, range 11 west, was filed in the district land office at Roseburg, Oregon, on August 16th, 1892; and that the official plat of the survey of township 14 south, range 8 west, was filed in the said land office on October 19th, 1892; and that the official plat of survey of township 15 south, range 8 west, was filed in the said land office on October 19th, 1892. And defendant says that each of said townships is within the district of lands subject *of* sale and proceedings in the said land office at Roseburg, Oregon.

44 VI.

Further answering the defendant says that many of the odd-numbered sections on each side of the said railroad within twenty and thirty miles thereof have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of; and on July 25th, 1866, and at all times since, all the odd-numbered sections of public land within thirty miles of said railroad, not granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of were and have been insufficient to make the quantity granted by the said act of July 25th, 1866.

The defendant admits and says that all the lands described in subdivision II of the bill of complaint lying within — 27 south, range 11 west, were duly selected by the defendant in its indemnity list No. 27 of selections; that the said list was in proper form, accompanied by all the fees, costs, and charges required by law, and the lands in it described were thereby duly selected by the defendant under the direction of the Secretary of the Interior, as indemnity lands granted by the said act of July 25th, 1866; and the said list was duly approved by the local land officers at Roseburg, Oregon, on August 16th, 1892, and by the Secretary of the Interior on or about January —, 1893.

The defendant also admits and says that all the lands described in subdivision II of the bill of complaint lying within township 14 south, range 8 west, were duly selected by the defendant in its indemnity list No. 28 of selections; that the said list was in

45 proper form accompanied by all the fees, costs, and charges required by law, and the lands in it described were thereby duly selected by the defendant under the direction of the Secretary of the Interior, as indemnity lands granted by the said act of July 25th, 1866; and the said list was duly approved by the local land officers at Roseburg, Oregon, on October 19th, 1892, and by the Secretary of the Interior on or about January —, 1893.

The defendant also admits and says that all the lands described in subdivision II of the bill of complaint lying within township 15 south, range 8 west, were duly selected by the defendant in its indemnity list list No. 29 of selections; that the said list was in proper form, accompanied by all the fees, costs, and charges required by law, and the lands in it described were thereby duly selected by the defendant under the direction of the Secretary of the Interior, as indemnity lands granted by the said act of July 25th, 1866; and the said list was duly approved by the local land officers at Roseburg, Oregon, on October 19th, 1892, and by the Secretary of the Interior on or about January —, 1893.

VII.

The defendant admits that on October 22d, 1892, one John Sapp made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the N. ½ of N. W. ¼ of section 7, township 15 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as

to any of the other matters and things set forth in subdivision X of the bill of complaint, and for that reason the defendant denies all such matters and things.

46 VIII.

The defendant admits that on November 3d, 1892, one Baxter W. Jenkins made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the S. E. ¼ of N. E. ¼, and the N. E. ¼ of S. E. ¼ of section 9, township 15 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XI of the bill of complaint, and for that reason the defendant denies all such matters and things.

IX.

The defendant admits that on October 25th, 1892, one Charles Heller, Jr., duly tendered his filing at the Roseburg land office, in the State and district of Oregon, for a homestead covering the S. ½ of the S. E. ¼, and the N. E. ¼ of S. E. ¼ and S. E. ¼ of N. E. ¼ of section 27, township 27 south, range 11 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XII of the bill of complaint, and for that reason the defendant denies all such matters and things.

X.

The defendant admits that on November 12th, 1892, one Charles S. Seely made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the N. ½ of N. W. ¼ of section 19, township 14 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge
47 or information as to any of the other matters and things set forth in subdivision XIII of the bill of complaint, and for that reason the defendant denies all such matters and things.

XI.

The defendant admits that on October 22d, 1892, one J. R. Peters made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the N. W. ¼ of N. E. ¼ of section 7, township 14 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XIV of the bill of complaint, and for that reason the defendant denies all such matters and things.

XII.

The defendant admits that on October 22d, 1892, one Joseph A. Cox made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the S. ½ of S. E. ¼ and the N. W. ¼ of S. E. ¼, and the S. E. ¼ of S. W. ¼ of section

33 township 14 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XV of the bill of complaint, and for that reason the defendant denies all such matters and things.

XIII.

The defendant admits that on October 27th, 1892, one John W. Carey made application at the Roseburg land office, in the
48 State and district of Oregon, for filing a homestead covering the N. E. ¼ of S. E. ¼ of section 19, township 14 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XVI of the bill of complaint, and for that reason the defendant denies all such matters and things.

XIV.

The defendant admits that on October 22d, 1892, one Uriah W. Wren made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the W. ½ of S. E. ¼ and the N. E. ¼ of S. W. ¼, and the S. E. ¼ of N. W. ¼ of section 25, township 14 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XVII of the bill of complaint, and for that reason the defendant denies all such matters and things.

XV.

The defendant admits that on October 22d, 1892, one Abram M. Peek made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the N. ½ of S. E. ¼ and N. E. ¼ of S. W. ¼, and the S. E. ¼ of N. W. ¼ of section 5, township 15 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XVIII of the bill of complaint, and for that reason the defendant denies all such matters and things.

49 XVI.

The defendant admits that on December 9th, 1892, one Alfred R. Young made application at the Roseburg land office, in the State and district of Oregon, for filing a pre-emption covering the S. E. ¼ of N. E. ¼ of section 5, township 15 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XIX of the bill of complaint, and for that reason the defendant denies all such matters and things.

XVII.

The defendant admits that on November 12th, 1892, one Francis W. Huddleston made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the W. ½ of N. E. ¼ and N. W. ¼ of S. E. ¼ of section 19, township 14 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XX of the bill of complaint, and for that reason the defendant denies all such matters and things.

XVIII.

The defendant admits that on October 22d, 1892, one Charles E. Banton made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering the N. E. ¼ of N. W. ¼ and the W. ½ of N. W. ¼ and the N. W. ¼ of S. W. ¼ of section 25, township 14 south, range 8 west, Willamette meridian.

But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XXI of the bill of complaint, and for that reason the defendant denies all such matters and things.

50

XIX.

The defendant admits that on October 22d, 1892, one George C. Peek made application at the Roseburg land office, in the State and district of Oregon, for filing a homestead covering S. ½ of S. W. ¼ and the N. W. ¼ of S. W. ¼ of section 5, township 15 south, range 8 west, Willamette meridian. But the defendant says that it has no knowledge or information as to any of the other matters and things set forth in subdivision XXII of the bill of complaint, and for that reason the defendant denies all such matters and things.

XX.

The defendant admits and avers that the said indemnity lists Nos. 27, 28, and 29 of selections made by it were duly presented to the General Land Office at the Capital in Washington, and thereafter to the Secretary of the Interior; but the defendant is not informed, and has no knowledge about such matters, and on that ground denies that at the time of the presentation of said lists at the General Land Office and to the Secretary of the Interior, no knowledge of the adverse claims set forth in subdivision XXIII of the bill of complaint was known to the General Land Office or to the Secretary of the Interior. The defendant admits and avers that the General Land Office and the Secretary of the Interior did, in due form, approve the said indemnity lists of selections when presented as aforesaid, and that thereafter, on or about February 20th, 1893, a patent was duly issued by the United States to the defendant for the lands described in subdivision XX of the bill of complaint; but the defendant is not informed, and has no knowledge about the matter, and so denies that the General Land Office or the Secretary of the

51

Interior approved the said indemnity lists of selections when presented, without knowledge of the said adverse claims, or that the said patent issued without knowledge by the General Land Office and the Secretary of the Interior of the said adverse claims.

The defendant denies that the ministerial officers of the United States, or any thereof, acted erroneously or contrary to law in issuing a patent to it (the defendant) for the lands described in the bill of complaint herein, or any thereof; or that the said patent is void, or should be so declared. The defendant admits that it claims title to all of said lands under the said patent; and says that the said patent was duly and properly issued, in pursuance and with full authority of law, and that all the officers of the United States acted properly, and none of them erroneously, in issuing the patent, and that the said patent is in all respects lawful and valid.

XXI.

The defendant admits that the Congress of the United States, by its act approved March 3d, 1887, mentioned in subdivision XXIV of the bill of complaint, provided as is in the said act set forth; and that on October 27th, 1893, the total grant of the lands in the State of Oregon made by the said act of July 25th, 1866, was unadjusted.

The defendant admits that C. P. Huntington is the presi-
52 dent of the Southern Pacific Company, but denies that the Southern Pacific Company or C. P. Huntington owns or controls the — or any land grant for this defendant. The defendant says that no demand was ever made upon it for reconveyance of any land described in the bill of complaint; and denies that it ever refused, but admits it refuses, to reconvey the same, or any thereof.

The defendant says that it has no information or knowledge as to any of the other matters and things set forth in subdivision XXIV of the bill of complaint, and on that ground it denies all of such matters and things.

And the defendant denies all and all manner of matter, cause, or thing in the complainant's said bill contained, material, or necessary for it to make answer to, and not herein well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of the defendant. All of which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court may direct; and the defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

WM. D. FENTON,
WM. SINGER, JR.,
Attorneys for Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

53 DISTRICT OF OREGON, } ss:
Multnomah County. }

I, Richard Koehler, being first duly sworn, on my oath do depose and say that I am second vice-president of the defendant above

named; that I have read the foregoing answer and know the contents thereof; that so much of the allegations of said answer as are not stated upon information and belief are true; that as to the matters and things therein stated upon information and belief I verily believe them to be true.

R. KOEHLER.

Subscribed and sworn to before me this 21st day of August, A. D. 1896.

[SEAL.] W. D. FENTON,
Notary Public for Oregon.

DISTRICT OF OREGON, } ss:
Multnomah County, }

Due service of the within answer is hereby admitted by receipt of a certified copy thereof, certified to by Wm. D. Fenton, one of solicitors for defendant.

Dated August 21st, 1896.

DANIEL R. MURPHY,
United States Attorney.

Filed August 22, 1896.

J. A. SLADEN, *Clerk.*

54 And afterward, to wit, on Friday, the 11th day of December, 1896, the same being the 59th judicial day of the regular October term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES vs. THE OREGON & CALIFORNIA RAILROAD COMPANY.	No. 2272. Dec. 11, 1896.

Order Allowing Time to File Reply.

Now, at this day, on motion of Mr. Charles J. Schnabel, assistant United States attorney, it is ordered that said plaintiff be, and it is her-by, allowed to file its reply herein.

55 And afterward, to wit, on the 12th day of December, 1896, there was duly filed in said court a replication, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Replication.

The replication of the above-named complainant to the answer of the above-named defendant herein.

The replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto saieth that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and
56 that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material, or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct, and humbly, as in and by its said bill it has already prayed.

DANIEL R. MURPHY,
United States Attorney and Solicitor for Complainant.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within reply and the receipt of a copy thereof duly prepared and certified to by Daniel R. Murphy, attorney for United States, is hereby admitted at the city of Portland, in said county and State, this 12th day of December, 1896.

WM. D. FENTON,
Attorney for Defendant.

Filed December 12, 1896.

J. A. SLADEN, *Clerk.*

57 And afterward, to wit, on the 17th day of December, 1896, there was duly filed in said court a motion for appointment of examiner, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Motion for Appointment of Examiner.

To W. D. Fenton, solicitor for defendant:

Please take notice that at a stated term of this court to be held on the 23d day of December, 1896, at Portland, the plaintiff in this cause will move, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order that an examiner be appointed herein, under the 67th rule as amended, to take the depositions of witnesses in behalf of said plaintiff.

DANIEL R. MURPHY,
United States Attorney and Solicitor for Plaintiff.

58 STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion and the receipt of a copy thereof duly prepared and certified to by D. R. Murphy, attorney for United States, is hereby admitted at the city of Portland, in said county and State, this 17th day of December, 1896.

WM. D. FENTON,
Of Attorneys for Defendant.

Filed December 17, 1896.

J. A. SLADEN, *Clerk.*

And afterward, to wit, on Thursday, the 24th day of December, 1896, the same being the 70th judicial day of the regular October term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Company. } No. 2272. December 24, 1896.

Order Referring Cause to Examiner.

Now, at this day, comes the plaintiff by Mr. Daniel R.
59 Murphy, United States attorney, and the defendant by Mr. W. D. Fenton, of counsel, and on motion of said defendant, it is ordered that this cause be, and it is hereby, referred to Mr.

George A. Brodie, examiner of this court, to take and report the testimony herein.

And afterward, to wit, on Thursday, the 9th day of December, 1897, the same being the 58th judicial day of the regular October term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2272. December 9, 1897.

Order Extending Time to Take Testimony.

Now, at this day, comes the plaintiff by Mr. Charles J. Schnabel, assistant United States attorney, and thereupon, on motion of said plaintiff, and upon stipulation of the parties filed herein, it is ordered that the defendant herein be, and it is hereby, allowed sixty days, after making and filing of a proposed stipulation as to facts in another cause between the same parties, in this court numbered 2,405, in which to take its testimony herein.

60 And afterward, to wit, on the 12th day of September, 1898, there was duly filed in said court a præcipe for appearance of homestead and pre-emption settlers, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Plaintiff,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Præcipe for Appearance of Settlers.

To the clerk of the above-entitled court:

By direction of the settlers of the lands involved in the above-entitled suit, and by leave first had and obtained, you will please enter our appearance in behalf of said settlers, whose names are set out in the bill of complaint herein filed, to wit: George C. Peek, Abram M. Peek, John Sapp, Charles S. Seeley, Baxter W. Jenkins, Joseph A. Cox, Charles Heller, Jr., J. R. Peters, John W. Carey, Uriah W. Wrenn Alfred R. Young, Francis W. Huddleston, and Charles E. Banton.

THAYER, ST. RAYNER & SCHNABEL.
W. W. THAYER,
HENRY ST. RAYNER, AND
CHAS. J. SCHNABEL.

Filed September 12, 1898.

J. A. SLADEN, *Clerk.*

61 And afterward, to wit, on the 31st day of October, 1898 there was duly filed in said court a præcipe for appearance of Charles Heller, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Plaintiff,
vs.
THE OREGON & CALIFORNIA R. R. CO., CHARLES HELLER, and Others.

Præcipe for Appearance of Charles Heller.

Come now Pipes & Tifft, and enter their appearance as attorneys for the defendant Charles Heller, in the above-entitled cause.

PIPES & TIFFT,
Attorneys for Defendant Charles Heller.

Filed October 31, 1898.

J. A. SLADEN, *Clerk.*

62 And afterward, to wit, on the 31st day of October, 1898, there was duly filed in said court a stipulation of facts in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon. In Equity.

UNITED STATES OF AMERICA, Complainant,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Stipulation of Facts.

It is stipulated and agreed as follows:

1st item. The act of Congress approved July 25th, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," as printed in volume 14 of the United States Statutes at Large, on pages 239 and following, is admitted in evidence.

2d item. The Oregon Central Railroad Company is a corporation duly incorporated and organized on April 22d, 1867, by and in virtue of the laws of the State of Oregon.

63 3d item. That the legislature of the State of Oregon, by its joint resolution adopted October 20th, 1868, duly designated the said Oregon Central Railroad Company as the company entitled to receive the lands granted in Oregon, and the benefits and privileges conferred, by the act of Congress referred to in the "1st item" hereof; and prior to the year 1869 the said company duly became entitled to all the benefits, privileges, and grants in the State of Oregon, mentioned in or offered by the said act of Congress.

4th item. The act of Congress approved June 25th, 1868, entitled "An act to amend an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,'" as printed in volume 15 of the United States Statutes at Large, on page 80, is admitted in evidence.

5th item. The act of Congress approved April 10th, 1869, entitled "An act to amend an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six," as printed in volume 16 of the United States Statutes at Large, on page 47, is admitted in evidence.

6th item. That on or about July 1st, 1869, the said Oregon Central Railroad Company duly filed in the Department of the Interior its assent to the act of Congress referred to in the "1st item" hereof.

7th item. Prior to the month of October, 1869, the said
64 Oregon Central Railroad Company definitely fixed on the ground and surveyed the first section of the railroad in Oregon contemplated and provided for by the act of Congress referred to in the "1st item" hereof, which section of railroad extended from Portland to Jefferson, and comprised not less than sixty continuous miles of railroad from the northern terminus thereof; and on October 29, 1869, the said company filed in the office of the Secretary of the Interior, and the Secretary of the Interior on January 29th, 1870, duly accepted and approved a map of the survey and definite location of the said first section of railroad.

8th item. During the year 1869 and the months of January and February of the year 1870 the said Oregon Central Railroad Company definitely fixed on the ground and surveyed the second section of the railroad contemplated and provided for by the act of Congress referred to in the "1st item" hereof, which section of railroad extended from Jefferson to a point near the southeast corner of section 35, in township 27 south, range 6 west, Willamette meridian, at or near Roseburg, and comprised not less than one hundred and twenty-four continuous miles of railroad from Jefferson; and on March 26th, 1870, the said company filed in the office of the Secretary of the Interior, and the Secretary of the Interior on March 29th, 1870, duly accepted and approved, a map of the survey and definite location of the said second section of railroad.

9th item. On April 7th, 1870, the Commissioner of the General Land Office, under direction of the Secretary of the Interior dated March 29th, 1870, withdrew all the odd-numbered sections of
65 land lying within thirty miles on each side of the railroad shown on the map of survey and definite location set forth in the "8th item" hereof from sale or location, pre-emption or homestead entry; and such withdrawal has remained in force, continuously, ever since, excepting in so far as, if at all, it was affected by the order of the Secretary of the Interior made on August 15th, 1887, set forth in the "11th item" hereof.

10th item. That portion of the lands withdrawn on April 7th, 1870, as set forth in the "9th item" hereof, which lie south of township 13 south, were at that date, and have ever since been, situated within the United States district of lands subject of sale and proceedings in the United States local land office at Roseburg, in the State of Oregon; and notice of the said withdrawal was duly received at the local land office at Roseburg on April 25th, 1870.

11th item. On August 15th, 1887, the Secretary of the Interior made an order declaring the withdrawal set forth in the "9th item" hereof revoked as to the odd-numbered sections lying within the indemnity limits of the grant made by the act of Congress referred to in the "1st item" hereof, and declaring the odd-numbered sections lying within the entire indemnity limits of said grant restored to the public domain, subject to pre-emption and homestead entry as well as to the provisions of the land grant made by the last-mentioned act of Congress.

12th item. The defendant, The Oregon & California Railroad Company is, and has been continuously since March 7th, 1870, a corporation, duly organized and existing by and in virtue of the laws of the State of Oregon.

13th item. On or about March 29th, 1870, the defendant,
66 The Oregon & California Railroad Company, duly became the successor and assignee of the said Oregon Central Railroad Company, and at the same time became the owner of and entitled to all the benefits, privileges, and grants in the State of Oregon mentioned in, offered or conferred by the act of Congress referred to in the "1st item" hereof; and the defendant company has ever since so remained.

14th item. During the years 1868 and 1869, and prior to December 25th, 1869, the said Oregon Central Railroad Company constructed and fully equipped the first twenty miles of the railroad contemplated by and provided for in the act of Congress referred to in the "1st item" hereof, commencing at Portland and extending along the line shown upon the map mentioned in the "7th item" hereof.

15th item. During the years 1869 and 1870, and prior to September 1st, 1870, the said Oregon Central Railroad Company and this defendant constructed and fully equipped the second twenty miles of the railroad contemplated by and provided for in the act of Congress referred to in the "1st item" hereof, commencing at the end of the first constructed twenty miles of railroad mentioned in the "14th item" hereof, and extending along the line shown upon the map mentioned in the "7th item" hereof, to a point distant forty miles from the commencement of the said railroad at Portland; a portion of the said second twenty miles of railroad having been so constructed and equipped by the said Oregon Central Railroad Company prior to March 29th, 1870, and the remainder thereof
67 having been so constructed and equipped by the defendant company between March 29th, 1870, and September 1st, 1870.

16th item. That the whole line of railroad contemplated and provided for by the act of Congress referred to in the "1st item"

hereof, commencing at the end of the second constructed twenty miles of railroad mentioned in the "15th item" hereof, and extending along the line shown upon the maps mentioned in the "7th item" and "8th item" hereof, was constructed by the defendant company during the years 1870, 1871 and 1872; and prior to December 4th, 1872, the said whole line of railroad from Portland to Roseburg was, and continuously since has been, fully operated for all the purposes contemplated by and provided for in the said act of Congress.

17th item. Commissioners were duly appointed by the President of the United States to examine the said railroad as constructed from Portland to Roseburg; and such commissioners did duly examine all of said railroad, and thereafter duly reported to the President of the United States, under oath, that all of the said railroad had been completed and equipped in all respects as required by the act of Congress referred to in the "1st item" hereof, and that the same was ready for the service contemplated by the said act; and such reports were duly accepted and approved by the President of the United States. That the said commissioners' reports were so made, accepted and approved on the following dates: The first twenty miles, commencing at Portland, report made on December 31st, 1869, accepted and approved on January 29th, 1870; the second twenty miles, report made on October 5th, 1870, ac-
68 cepted and approved on February 28th, 1871; the third and fourth twenty miles, report made on December 10th, 1870, accepted and approved on February 28th, 1871; the fifth twenty miles, report made on August 11th, 1871, accepted and approved on March 11th, 1872; the sixth twenty miles, report made on January 13th, 1872, accepted and approved on March 11th, 1872; the seventh, eighth, and ninth sections, including the last seventy-eight miles of the said railroad from Portland to Roseburg, report made on July 10th, 1878, accepted and approved on July 11th, 1878.

18th item. The remaining part of the railroad in Oregon contemplated and provided for by the act of Congress referred to in the "1st item" hereof, extending from Roseburg to the southern boundary of Oregon, was actually constructed, fully equipped, and made ready by the defendant company for the service contemplated by the said act, in several sections, during the years 1878 to 1889, inclusive, and all prior to the year 1890; and at various times prior to the last-mentioned date, commissioners, duly appointed by the President of the United States, examined the same as the several sections thereof were constructed, and duly reported under oath to the President of the United States that the same had been completed and equipped in all respects as required by the said act of Congress, and that the same was ready for the service contemplated by the said act; and at various times prior to the last-mentioned date the President of the United States duly accepted and approved the said reports.

19th item. All of the lands described in paragraph II of
69 the complainant's bill of complaint are distant more than twenty miles from, but lie within thirty miles on one side of,

the railroad extending from Jefferson to Roseburg, shown on the map filed on March 26th, 1870, and approved by the Secretary of the Interior on March 29th, 1870, referred to in the "18th item" hereof; and the said lands are distant more than twenty miles from, but lie within thirty miles on one side of, that portion of the railroad of the defendant company as constructed and equipped, which extends from Jefferson to Roseburg; and all of the said lands were included and embraced by the withdrawal set forth in the "9th item" hereof.

20th item. No part or portion of the lands described in paragraph II of the complainant's bill of complaint is mineral land, nor included by any exception or reservation from the indemnity land grant in Oregon made by the act of Congress referred to in the "1st item" hereof, except in so far as, if at all, they were excepted or reserved therefrom by reason of the several settlements, performances and proceedings hereinafter set forth.

21st item. The official plat of the survey of township 27 south, range 11 west, Willamette meridian, was filed in the United States land office at Roseburg, Oregon, on August 16th, 1892; and the official plats of the survey of townships 14 south and 15 south, range 8 west, same meridian, were filed in the said land office on October 19th, 1892.

22d item. On August 16th, 1892, all the lands described in paragraph II of the complainant's bill of complaint lying within the said township 27 south, range 11 west, were free and clear for selection by the defendant company as part and parcel of the indemnity lands granted by the act of Congress referred to in the "1st item" hereof, except in so far as, if at all, they were excepted or reserved therefrom by reason of the several settlements, performances and proceedings hereinafter set forth; and on October 19th, 1892, all the lands in paragraph II of the complainant's bill of complaint lying within the said townships 14 south and 15 south, range 8 west, were free and clear for selection by the defendant company as part and parcel of the indemnity lands granted by the said act of Congress, except in so far as, if at all, they were excepted or reserved therefrom by reason of the several settlements, performances, and proceedings hereinafter set forth.

23d item. On November 7th, 1879, the Secretary of the Interior approved and issued a general circular of instructions relating to the adjustment of railroad land grants, prescribing the form and procedure for the selection by railroad companies of lands within the primary and indemnity limits of land grants made by Congress to such companies; which circular has, ever since its date, remained in force and operation as to the following, amongst other, directions therein made by the Secretary of the Interior, relating to the lists required to be filed by railroad companies in selecting lands within the primary and indemnity limits of their land grants from Congress, to wit: "The lists must be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office. When so examined and tested and found

correct in all respects, they will become final locations, and
71 you will, on the payment of the requisite fees to the receiver, so certify at the foot of each list, according to form B."

24th item. On August 16th, 1892, the defendant company filed with the register and receiver of the United States land office at Roseburg, its list No. 27, selecting the lands described in paragraph II of the complainant's bill of complaint lying in township 27 south, range 11 west, as indemnity lands granted by the act of Congress referred to in the "1st item" hereof, in lieu of lands of equal area parts of odd-numbered sections lying within the primary limits of the land grant made by the act of Congress and otherwise disposed of by the United States prior to the passage of the said act; which list was in proper form accompanied by the fees, costs and charges required by law, and in all respects complied with and conformed to the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office; and on the same day (August 16th, 1892) the said register and receiver carefully examined the said list, and tested its accuracy by the plats and records of their office, and found the same correct in all respects, and upon payment of the requisite fees that day made to the receiver, the register and receiver on that day approved the said list, and duly certified the said list as required by law, the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office. At the time the said list was filed and approved the defend-
72 ant company had not, nor has it since, selected or received any lands in lieu of the lands described in the same list as the basis of the selection by it made, other than the lands so selected by the said list.

25th item. On October 19th, 1892, the defendant company filed with the register and receiver of the United States Land Office at Roseburg its list No. 28 selecting the lands described in paragraph II of the complainant's bill of complaint lying in township 14 south, range 8 west, as indemnity lands granted by the act of Congress referred to in the "1st item" hereof, in lieu of lands of equal area, parts of odd-numbered sections lying within the primary limits of the land grant made by the said act of Congress and otherwise disposed of by the United States prior to the passage of the said act; which list was in proper form, accompanied by the fees, costs and charges required by law, and in all respects complied with and conformed to the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office; and on the same day (October 19th, 1892) the said register and receiver carefully examined the said list, and tested its accuracy by the plats and records of their office, and found the same correct in all respects, and upon payment of the requisite fees that day made to the receiver, the register and receiver on that day approved the said list, and duly certified the same as required by law, the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office. At the time the said list was filed and approved the defend-

ant company had not, nor has it since, selected or received any lands in lieu of the lands described in the said list as the
73 basis of the selection by it made, other than the lands therein selected.

26th item. On October 19th, 1892, the defendant company filed with the register and receiver of the United States land office at Roseburg its list No. 29, selecting the lands described in paragraph II of the complainant's bill of complaint lying in township 15 south, range 8 west, as indemnity lands granted by the act of Congress referred to in the "1st item" hereof, in lieu of lands of equal area parts of odd-numbered sections lying within the primary limits of the land grant made by the said act of Congress and otherwise disposed of by the United States prior to the passage of the said act; which list was in proper form, accompanied by the fees, costs and charges required by law, and in all respects complied with and conformed to the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office; and on the same day (October 19th, 1892) the said register and receiver carefully examined the said list, and tested its accuracy by the plats and records of their office, and found the same correct in all respects, and upon payment of the requisite fees that day made to the receiver, the register and receiver on that day approved the said list, and duly certified the same as required by law, the directions, rules, regulations, and requirements of the Secretary of the Interior and the Commissioner of the General Land Office. At the time the said list was filed and approved the defendant company had not, nor has it since, selected or received any lands
74 in lieu of the lands described in the said list as the basis of the selection by it made, other than the lands therein selected.

27th item. On September —, 1889, Charles S. Seely, a duly qualified entryman under the homestead laws of the United States, settled upon the N. ½ of N. W. ¼ of section 19, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barns, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $700. On November 12th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Charles S. Seely, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

28th item. On October 15th, 1889, John W. Carey, a duly qualified entryman under the homestead laws of the United States, settled upon the N. E. ¼ of N. E. ¼ of section 19, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost,

in all, about $500. On October 27th, 1892, and within ninety days after the official plat of the survey of the said land was filed
75 in the United States land office at Roseburg, the said John W. Carey, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

29th item. On April 26th, 1890, Francis W. Huddleston, a duly qualified entryman under the homestead laws of the United States, settled upon the S. W. ¼ of S. E. ¼ of section 18, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same in connection with the W. ½ of N. E. ¼ and N. W. ¼ of S. E. ¼ of section 19, in the same township and range; and from the date of his settlement to the commencement of this suit continued to reside upon the said S. W. ¼ of S. E. ¼ of section 18, and made improvements thereon in the way of a dwelling-house, barns, outhouses, fencing, clearing and the planting of fruit trees, which cost, in all, about $800; and during all of that time he used the said W. ½ of N. E. ¼ and N. W. ¼ of S. E. ¼ of section 19 as pasture land. On November 12th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Francis W. Huddleston, in good faith, filed his application in the said land office to make homestead entry in his name of and for all of the said land, under the homestead laws of the United States.

30th item. On July —, 1885, Charles E. Banton, a duly qualified entryman under the homestead laws of the United States, settled upon the N. E. ¼ of N. W. ¼, W. ½ of N. W. ¼, and N. W. ¼ of S. W. ¼ of section 25, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same, and
76 from the date of his settlement to the commencement of this suit continued to reside upon the said land off and on, but making it his home, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Charles E. Banton, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land under the homestead laws of the United States.

31st item. On July —, 1883, Uriah W. Wren, a duly qualified entryman under the homestead laws of the United States, settled upon the W. ½ of S. E. ¼, N. E. ¼ of S. W. ¼, and S. E. ¼ of N. W. ¼ of section 25, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost in all, about $2,000. On November 12th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Uriah W. Wren, in good faith, filed his applica-

tion in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

32d item. On September 17th, 1888, Joseph A. Cox, a duly
77 qualified entryman under the homestead laws of the United States, settled upon the S. ½ of S. E. ¼, N. W. ¼ of S. E. ¼, and S. E. ¼ of S. W. ¼ of section 33, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $300. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Joseph A. Cox, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

33d item. On April —, 1882, George C. Peek, a duly qualified entryman under the homestead laws of the United States, settled upon the S. ½ of S. W. ¼ and N. W. ¼ of S. W. ¼ of section 5, in township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barns, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said George C. Peek, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

78 34th item. On August 10th, 1890, Alfred R. Young, a duly qualified entryman under the pre-emption laws of the United States, settled upon the S. E. ¼ of N. E. ¼ of section 5, township 15 south, range 8 west, Willamette meridian, intending to make pre-emption entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all about $1,200. On December 9th, 1892, and within ninety days after the official plat of the said land was filed in the United States land office at Roseburg, the said Alfred R. Young, in good faith, applied to file a pre-emption claim in the said land office in his name for the said land, under the pre-emption laws of the United States.

35th item. During the year 1878, Abram M. Peek, a duly qualified entryman under the homestead laws of the United States, settled upon N. ½ of S. E. ¼, N. E. ¼ of S. W. ¼ and S. E. ¼ of N. W. ¼ of section 5, in township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his

settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing and the planting of trees, which cost, in all, about $1,700. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Abram M. Peek, in good faith, filed his application in
79 the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

36th item. During the year 1878, J. R. Peters, a duly qualified entryman under the homestead laws of the United States, settled upon the N. W. ¼ of N. E. ¼ of section 7, in township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said J. R. Peters, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

37th item. On October —, 1878, John Sapp, a duly qualified entryman under the homestead laws of the United States, settled upon the N. ½ of N. W. ¼ of section 7, in township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United
80 States land office at Roseburg, the said John Sapp, in good faith, filed his application in the said land office to make homestead entry in his name for the said land under the homestead laws of the United States.

38th item. On May 28th, 1885, Baxter W. Jenkins, a duly qualified entryman under the homestead laws of the United States, settled upon the S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼ of section 9, township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same, and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On November 3d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Baxter W. Jenkins, in good faith, filed his application in the said land office to

make homestead entry in the name of and for the said land, under the homestead laws of the United States.

39th item. On October —, 1869, Louis Heller, a qualified entryman under the homestead laws of the United States, settled upon the S. ½ of S. E. ¼, N. E. ¼ of S. E. ¼, and S. E. ¼ of N. E. ¼ of section 27, in township 27 south, range 11 west, Willimette meridian, intending to make homestead entry of the same; and from the date of his settlement until October —, 1889, he continued to reside upon and cultivate the said land, at which last-mentioned date he died; and after his death his widow and children continued to reside upon the said land; and he and his wife and children made improvements
81 thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing and planting of fruit trees, of the value of about $3,000. On October 25th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, Charles Heller, one of his sons and heirs-at-law of the said Louis Heller, deceased, duly tendered in the said land office his filing for the benefit of all the heirs-at-law of the said Louis Heller, deceased, as a homestead, for all of the said land.

40th item. That the said selection lists Nos. 27, 28, and 29, set forth in the 24th, 25th and 26th items hereof, were presented to and approved by the Commissioner of the General Land Office and the Secretary of the Interior; and thereafter, on February 20th, 1893, a patent was issued by the proper officers of the United States conveying all the lands described in the complainant's bill of complaint as amended, and herein, to the defendant company; but at the times when the said list was presented to and approved by them as aforesaid neither the Commissioner of the General Land Office nor the Secretary of the Interior had any knowledge of the adverse claims of the said Charles S. Seeley, John W. Carey, Francis W. Huddelston, Charles E. Banton, Uriah W. Wren, Joseph A. Cox, George C. Peck, Alfred R. Young, Abram M. Peek, J. R. Peters, John Sapp, Baxter W. Jenkins, or Charles Heller to the said lands.

41st item. On October 27th, 1893, the land grant made by the act of Congress referred to in the "1st item" hereof was unadjusted, and the Secretary of the Interior regarding the patent referred to in the "40th item" hereof as having been erroneously issued, directed
82 the Commissioner of the General Land Office to demand reconveyance as provided by statute; and in accordance with such directions the Commissioner of the General Land Office did, on that day (October 27th, 1893), duly demand of the defendant company a reconveyance of the lands conveyed by the said patent, and the said company refused, and still refuses, to make such reconveyance.

42d item. That the defendant company claims to be the owner of all the lands conveyed by the patent referred to in the "40th item" hereof, by title in fee-simple absolute; and it withholds all of the said lands from the complainant.

43d item. It is further agreed that this stipulation is, and shall always be, deemed conclusive evidence for the purposes of this suit, of the truth of all the matters and things in it stipulated and agreed

to be true, as fully and effectually as if each and all of such matters and things were, or had been, conclusively proven by the introduction of documents and the testimony of witnesses; but each party reserves the right to introduce further and additional testimony and evidence.

Dated and signed —— —, 1897.

JOHN W. GRIGGS,
United States Attorney General.
—— ——,
United States Attorney for Oregon.
WM. F. HERRIN,
WM. D. FENTON, AND
WM. SINGER, JR.,
Counsel and Attorneys for Defendant.

Filed October 31, 1898.

J. A. SLADEN, *Clerk.*

83 And afterward, to wit, on the 10th day of February, 1899, there was duly filed in said court a stipulation extending time to take testimony, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Stipulation Extending Time to Take Testimony.

It is hereby stipulated and agreed between the complainant and defendant that defendant may have sixty days from this 9th day of February, 1899, wherein to take such testimony in the above-entitled suit as it may deem necessary and proper.

JOHN H. HALL,
Attorney for Complainant and United States Attorney,
FENTON, BRONAUGH & MUIR,
Attorneys for Defendant.

Filed February 10, 1899.

J. A. SLADEN, *Clerk.*

84 And afterward to wit, on Friday, the 3d day of March, 1899, the same being the 126th judicial day of the regular October term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Company. } No. 2272. March 3, 1899.

Order Setting Cause for Final Hearing.

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. Wm. T. Muir, of counsel, and thereupon, on motion of said plaintiff, it is ordered that the final hearing of this cause be, and it is hereby, set for Monday, May 15, 1899.

85 And afterward, to wit, on Monday, the 15th day of May, 1899, the same being the 30th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Co. } No. 2272. May 15, 1899.

Record of Final Hearing and Order Extending Time to File Briefs.

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, the defendant by Mr. J. S. Moseby, who upon motion of said United States attorney, was permitted to appear for said defendant in this cause, and Mr. W. D. Fenton, of counsel, and certain settlers upon the lands referred to in the bill of complaint herein by Mr. W. W. Thayer, Mr. Henry St. Rayner, and Mr. Charles J. Schnabel, of counsel, and, thereupon, this cause comes on for final hearing, and the court having heard the arguments of counsel, will advise thereof.

And thereupon it is ordered that the respective counsel for the parties hereto be, and they are hereby, allowed sixty days in which to file their briefs in this cause.

86 And afterward, to wit, on the 31st day of August, 1899, there was duly filed in said court a stipulation extending time to file briefs, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2272.

Stipulation Extending Time to File Briefs.

It is hereby stipulated and agreed by and between the parties hereto, acting by and through their respective solicitors, that the defendant, The Oregon & California Railroad Company, may have until and inclusive of the 18th day of September, 1899, in which to file brief herein.

It is further agreed that the said Oregon & California Railroad Company may have until and inclusive of September 18th, 1899, within which to file brief in cases Nos. 2,273, 2,388 and 2,405, 2,422, and 2,501, all of said cases being entitled as above.

It is further stipulated and agreed that the said Oregon & California Railroad Company may have until and inclusive of
87 the said 18th day of September, 1899, within which to file answers and present a proposed statement of facts in cases Nos. 2,560 and 2,561, being entitled as above.

August 31st, 1899.

JOHN H. HALL,
United States Attorney.
W. D. FENTON,
E. C. BRONAUGH, AND
WM. T. MUIR,
Of Attorneys for O. & C. R. R. Co.

Filed August 31, 1899.

J. A. SLADEN, *Clerk.*

And afterward, to wit, on Thursday, the 31st day of August, 1899, the same being the 121st judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILroad Company. } No. 2272. August 31, 1899.

Order Extending Time to File Briefs.

Now, at this day, on motion of Mr. Wm. T. Muir, of counsel for the defendant herein, and upon stipulation of the parties filed herein, it is ordered that said defendant be, and it is hereby, allowed until

and including Monday September 18, 1899, in which to file its brief herein.

88 And afterward, to wit, on Friday, the 27th day of April, 1900, the same being the 16th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD Company, } No. 2272. April 27, 1900.

Decree and Order Extending Time to Further Plead.

This cause was heard upon the pleadings and the proofs herein, and was argued by Mr. John H. Hall, United States attorney, of counsel for the plaintiff, and by Mr. W. D. Fenton and Mr. John S. Moseby, of counsel for the defendant, several homestead and pre-emption claimants appearing by Messrs. Thayer, St. Rayner & Schnabel, and thereupon the court took the same under advisement, and having duly considered the same it is now ordered, adjudged, and decreed that the equity of this cause is with the plaintiff, and that the prayer of the bill of complaint herein be, and the same is hereby, allowed; and, it is further ordered that said defendant be, and it is hereby, allowed ten days from this date in which to further move or plead herein.

89 And afterward, to wit, on the 27th day of April, 1900, there was duly filed in said court an opinion of the court, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD Company. } Cases Nos. 2272, 2273, 2388, 2405, 2422, 2501, 2560, 2561.

Opinion.

John H. Hall, United States district attorney, for the Government.

Wm. D. Fenton and Wm. Singer, Jr., attorneys for the defendant.

Wm. F. Herrin, counsel for the defendant.

Thayer, St. Rayner & Schnabel, for the homestead and pre-emption claimants.

BELLINGER, *J.:*

These are suits to cancel patents issued by the United States to the defendant company, conveying the title to certain odd sections

of land within the indemnity limits of the land grants made by Congress to aid in the construction of the defendant's railroad from Portland to the southern boundary of Oregon, and of its road
90 from Portland, on the west side of the Willamette river, to the town of McMinnville, in this State.

The questions to be determined arise under two acts of Congress granting land to aid in the construction of said railroads, one of July 25, 1866 (14 Stats. at Large, 239), known as the "East Side grant," and the other of May 4, 1870 (16 Stats. at Large, 94), known as the "West Side grant."

Section 2 of the act of July 25, 1866, provides: "That there be, and hereby is, granted * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile (10 on each side) of said railroad line, and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated as aforesaid shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than 10 miles beyond the limits of said first-named alternate sections, and as soon as said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad or any portion thereof, not less than 60 continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located, and within the limits before specified."

The act of May 4, 1870, after making grant of lands within
91 the primary limits of the road, provides as follows: "And in case the quantity of 10 full sections per mile cannot be found on each side of said road, within the said limits of 20 miles, other lands, designated as aforesaid, shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than 25 miles from the track of said road, to make up such deficiency."

The suit is brought by the United States for the benefit of some 30 pre-emption and homestead claimants who settled upon the lands in question after the defendant's map of survey or definite location of its railroad was filed with and accepted by the Secretary of the Interior, and after the railroad had been constructed, and accepted by the United States, but before the company filed its lists of selections in the local land office. Those who had thus made settlement upon these lands were in actual occupation of the same at the time the defendant's selections thereof were filed and approved for patenting; and after such selections had been filed and approved for patenting by the land office, but within 90 days of the filing of the official plat of survey of the lands, the settlers applied to file pre-emption and homestead claims therefor. But regardless of these claims, the Government issued its patents to the railroad company. Some of these settlements were begun as early as 1853, and nearly one-half of the claimants have been in possession of

their respective tracts more than 20 years. All have made improvements, the amount of which in some cases is of the agreed value of $3,000.

92 There is a well-established distinction between "granted lands" and "indemity lands" in the construction of land grants in aid of railroads, and the principle is firmly established that the title to lands in the indemnity class does not vest in the railroad company for the benefit of which they are contingently granted, but in the fullest legal sense remains in the United States, until they are actually selected and set apart under the direction of the Secretary of the Interior specifically for indemnity purposes. Until such time the title remains in the Government, subject to its disposal at its pleasure. (Grinnell *vs.* R. R. Co., 103 U. S. 739; St. Paul etc. Railroad *vs.* Winona & St. Peter Railroad, 112 U. S. 720; Kansas Pacific Railroad *vs.* Atchison Railroad, 112 U. S., 414; Cedar Rapids & Missouri River Railroad *vs.* Herring, 110 U. S. 27; Barney *vs.* Winona & St. Peter Railroad, 117 U. S. 228; Sioux City etc. Railroad *vs.* Chicago, Milwaukee etc. Railway, 117 U. S. 406; United States *vs.* Missouri, Kansas & Texas Railway Company, 141 U. S. 374.)

The defendant undertakes to distinguish this case from those cited, upon the authority of the case of St. Paul & Pacific Railroad Company *vs.* Northern Pacific Railroad Company, 139 U. S. 1. That was a case of contest between two railroad companies, and it was held that the exception in the grant to the Northern Pacific Railroad Company of all subsequent grants prior to the definite location of its road was not intended to cover other grants for the construction of roads of a similar character. And in that connection the court says there was no occasion for the exercise of the judg-

93 ment of the Secretary of the Interior in selecting indemnity lands, as all the lands within the indemnity limits only made up in part for the deficiency. The distinction which is sought to be established is based upon this conclusion of the court, that there was no occasion in that case for the exercise of the judgment of the Secretary of the Interior in selecting indemnity lands, and upon the application made of this case in the late case of Southern Pacific *vs.* Groeck, 87 Federal, 970. In the case last referred to the company had accepted the terms of the grant and fixed the general route of its road as contemplated by the act, and filed a map thereof in the office of the Commissioner of the General Land Office, which had been approved, and in pursuance of which the Secretary of the Interior withdrew the odd sections of land, including the land in controversy, from sale or location, pre-emption or homestead entry. Thereafter the Secretary revoked the order of withdrawal, which order of revocation was subsequently suspended. The defendant's title was initiated and was procured at the time the lands had been restored by the setting aside of the order of withdrawal. The court was of the opinion that the subsequent cancellation of the order of withdrawal did not authorize the defendant's pre-emption, which was nevertheless in violation of law and right. But the court further held that, in the case of such a grant as that under considera-

tion, the terms of the grant itself operated to withdraw the indemnity lands from settlement from the moment when a map of the general route of the road was made and filed. In support of the conclusion reached, the court also cited the case of St. Paul
94 Railroad Company *vs.* Winona Railroad, 112 U. S. 720. That was also a case of conflict between two railroad grants, which overlapped, and it was held, as in the cases above cited, that in case of lieu lands, neither priority of grant, nor priority of location nor priority of construction, gives priority of right; but that this is determined by priority of selection when the selection is made according to law.

I do not think that the court intended, in the case of the Southern Pacific Railroad *vs.* Groeck, to establish a new rule for cases of this kind, based upon a distinction between cases where all the lands within the indemnity limits do not more than make up for the deficiency in the primary grant, and cases where the lands within the indemnity limits are more than enough for such deficiency.

It has been the uniform policy of the Government to permit settlement upon indemnity lands—lands contingently granted to aid in the construction of railroads; and this policy has been extended to lands within the primary limits of such grants, by an act passed in 1876 (19 Stat. at Large, 35), which provides for confirmation of all homestead and pre-emption entries made in good faith by actual settlers, upon tracts of not more than 160 acres within the limits of any land grant, prior to the time when notice of the withdrawal of lands embraced in the grant is received at the local land office.

It can make no difference in any case that it turns out that all the odd-numbered sections within the indemnity limits are not more than is required to make up the deficiency in the primary grant. How is the fact to be known? It must be ascertained in some
95 manner. Some action by the Secretary of the Interior is necessary in order to determine it, and there must be public information of the fact when it is determined, so that the interested public may be advised. The only means provided for is that of selections to be made by the Secretary. In this connection the opinion of the court in Wisconsin Central Railroad *vs.* Price County, 133 U. S. 496, has direct application: "He (the Secretary) was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the Government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. * * * Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the

proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

96 The words employed in the two granting acts in the cases in question remove all doubt, if there is otherwise room for doubt: "And when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior," etc. Such is the language employed in the act of 1866. That employed in the act of 1870 is of like effect: "And in case the quantity of 10 full sections per mile cannot be found on each side of said road, within the said limits of 20 miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior," etc.

There is no room to argue that the Secretary is not required by the circumstances of the case to make selections, when he is so required by the mandate of the two granting acts. And these "selections" are indispensable to the operation of the grant within the indemnity limits. It does not otherwise attach to any lands within these limits, and had not so attached at the date of the homestead and pre-emption settlements made by the settlers for whose benefit this suit is brought.

I am of the opinion that these suits are properly brought by the United States; that the contention that when an equitable title is claimed by the homesteader and pre-emptioner, the Government has no actionable interest, cannot be sustained.

97 The case of the United States *vs.* Missouri Railway, 141 U. S. 358 is decisive of the question. That was a case in which the decision of the court was based upon the conclusion that the patents held for cancellation included lands which equitably belonged to *bona fide* settlers, whose rights had been acquired under the homestead and pre-emption laws. As to some of the interests in that case, the jurisdiction was maintained on the ground that the United States was under an obligation to claimants, under the homestead and pre-emption laws, to undo the wrong alleged to have been done by its officers in issuing patents to the company, and thereby enable it to properly administer these lands and give clear title to those whose rights were superior to those of the railway company. It is true that as to some of the lands it appeared from the averments of the bill that the United States had a direct interest; but, as just stated, this was true as to only a part of the lands in question. The jurisdiction was maintained in that case, as it must be in this, upon the ground that there existed on the part of the United States an obligetion to issue patents to the rightful owners of the lands in question, and that they could not perform this obligation until the patents complained of were annulled. The

court further says that these principles equally apply where patents have been issued by mistake, and they are specially applicable where a multiplicity of suits, each one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice. These considerations have application in the case on trial. There must be a decree as
98 prayed for in the bill in cases Nos. 2,272, 2,273. In cases 2,405, 2,422, 2,560, 2,561, the pleas to the bill are overruled. In cases 2,388, 2,501, the demurrer is overruled.

Filed April 27, 1900.

J. A. SLADEN, *Clerk.*

And afterward, to wit, on Monday, the 7th day of May, 1900, the same being the 24th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case; to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES *vs.* THE OREGON & CALIFORNIA RAILROAD CO } No. 2272. May 7, 1900.

Order Extending Time to Further Plead.

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. W. D. Fenton, of counsel, and thereupon, on motion of said defendant, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same hereby is, extended ten days.

99 And afterward, to wit, on Thursday, the 17th day of May, 1900, the same being the 33d judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES *vs.* THE OREGON & CALIFORNIA RAILROAD CO. } No. 2272. May 17, 1900.

Order Extending Time to Further Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the above-named defendant, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, further extended ten days.

And afterward, to wit, on Monday, the 28th day of May, 1900, the same being the 42d judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

100 In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2272. May 28, 1900.

Order Extending Time to Further Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendant herein, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, further extended ten days.

And afterward, to wit, on Friday, the 15th day of June, 1900, the same being the 58th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

101 In the Circuit Court of the United States for the District of Oregon. In Equity.

UNITED STATES OF AMERICA, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD Company, Defendant. } No. 2272. June 15, 1900.

Final Decree.

This cause was regularly heard by the court upon the pleadings and proofs herein, and was argued by Mr. John H. Hall, United States attorney, and by Mr. John S. Moseby and Mr. W. D. Fenton, of counsel for the above-named defendant; and the court having, on the 27th day of April, 1900, found the equities of this cause, based upon the stipulation of facts entered into between the plaintiff and defendant, and filed herein, to be with the plaintiff in this cause, which said stipulation of facts the court then adopted as its findings of fact, and which said findings of fact are as follows, to wit:

1st item. The act of Congress approved July 25th, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California, to Portland, in Oregon," as printed in volume 14 of the United States

Statutes at Large, on pages 239 and following, is admitted in evidence.

102 2d item. The Oregon Central Railroad Company is a corporation duly incorporated and organized on April 22d, 1867, by and in virtue of the laws of the State of Oregon.

3d item. That the legislature of the State of Oregon, by its joint resolution adopted October 20th, 1868, duly designated the said Oregon Central Railroad Company as the company entitled to receive the lands granted in Oregon, and the benefits and privileges conferred, by the act of Congress referred to in the "1st item" hereof; and prior to the year 1869 the said company duly became entitled to all the benefits, privileges, and grants in the State of Oregon, mentioned in or offered by the said act of Congress.

4th item. The act of Congress approved June 25th, 1868, entitled "An act to amend an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon,'" as printed in volume 15 of the United States Statutes at Large, on page 80, is admitted in evidence.

5th item. The act of Congress approved April 10th, 1869, entitled "An act to amend an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six," as printed in volume 16 of the United States Statutes at Large, on page 47, is admitted in evidence.

6th item. That on or about July 1st, 1869, the said Oregon Central Railroad Company duly filed in the Department of the Interior its assent to the act of Congress referred to in the "1st item" hereof.

103 7th item. Prior to the month of October, 1869, the said Oregon Central Railroad Company definitely fixed on the ground and surveyed the first section of the railroad in Oregon contemplated and provided for by the act of Congress referred to in the "1st item" hereof, which section of railroad extended from Portland to Jefferson, and comprised not less than sixty continuous miles of railroad from the northern terminus thereof; and on October 29, 1869, the said company filed in the office of the Secretary of the Interior, and the Secretary of the Interior on January 29th, 1870, duly accepted and approved a map of the survey and definite location of the said first section of railroad.

8th item. During the year 1869 and the months of January and February in the year 1870 the said Oregon Central Railroad Company definitely fixed on the ground and surveyed the second section of the railroad contemplated and provided for by the act of Congress referred to in the "1st item" hereof, which section of railroad extended from Jefferson to a point near the southeast corner of section 35, in township 27 south, range 6 west, Willamette meridian, at or near Roseburg, and comprised not less than one hundred and twenty-four continuous miles of railroad from Jefferson; and on March 26th, 1870, the said company filed in the office of the Secre-

tary of the Interior, and the Secretary of the Interior on March 29th, 1870, duly accepted and approved a map of the survey and definite location of the said second section of railroad.

9th item. On April 7th, 1870, the Commissioner of the General Land Office, under direction of the Secretary of the Interior
104 dated March 29th, 1870, withdrew all the odd-numbered sections of land lying within thirty miles on each side of the railroad shown on the map of survey and definite location set forth in the "8th item" hereof from sale or location, pre-emption or homestead entry; and such withdrawal has remained in force, continuously, ever since, excepting in so far as, if at all, it was affected by the order of the Secretary of the Interior made on August 15th, 1887, set forth in the "11th item" hereof.

10th item. That portion of the lands withdrawn on April 7th, 1870, as set forth in the "9th item" hereof, which lie south of township 13 south, were at that date, and have ever since been, situated within the United States district of lands subject of sale and proceedings in the United States local land office at Roseburg, in the State of Oregon; and notice of the said withdrawal was duly received at the local land office at Roseburg on April 25th, 1870.

11th item. On August 15th, 1887, the Secretary of the Interior made an order declaring the withdrawal set forth in the "9th item" hereof revoked as to the odd-numbered sections lying within the indemnity limits of the grant made by the act of Congress referred to in the "1st item" hereof, and declaring the odd-numbered sections lying within the entire indemnity limits of said grant restored to the public domain, subject to pre-emption and homestead entry as well as to the provisions of the land grant made by the last-mentioned act of Congress.

12th item. The defendant, The Oregon & California Railroad Company is, and has been continuously since March 7th, 1870, a corporation, duly organized and existing by and in virtue of the laws of the State of Oregon.

13th item. On or about March 29th, 1870, the defendant,
105 the Oregon & California Railroad Company, duly became the successor and assignee of the said Oregon Central Railroad Company, and at the same time became the owner of and entitled to all the benefits, privileges, and grants in the State of Oregon mentioned in, offered or conferred by the act of Congress referred to in the "1st item" hereof; and the defendant company has ever since so remained.

14th item. During the years 1868 and 1869, and prior to December 25th, 1869, the said Oregon Central Railroad Company constructed and fully equipped the first twenty miles of the railroad contemplated by and provided for in the act of Congress referred to in the "1st item" hereof, commencing at Portland and extending along the line shown upon the map mentioned in the "7th item" hereof.

15th item. During the years 1869 and 1870, and prior to September 1st, 1870, the said Oregon Central Railroad Company and this defendant constructed and fully equipped the second twenty miles of the railroad contemplated by and provided for in the act of Con-

gress referred to in the "1st item" hereof, commencing at the end of the first constructed twenty miles of railroad mentioned in the "14th item" hereof, and extending along the line shown upon the map mentioned in the "7th item" hereof, to a point distant forty miles from the commencement of the said railroad at Portland; a portion of the said second twenty miles of railroad having been so constructed and equipped by the said Oregon Central Railroad Company prior to March 29th, 1870, and the remainder thereof
106 having been so constructed and equipped by the defendant company between March 29th, 1870, and September 1st, 1870.

16th item. That the whole line of railroad contemplated and provided for by the act of Congress referred to in the "1st item" hereof, commencing at the end of the second constructed twenty miles of railroad mentioned in the "15th item" hereof, and extending along the line shown upon the maps mentioned in the "7th item" and "8th item" hereof, was constructed by the defendant company during the years 1870, 1871 and 1872; and prior to December 4th, 1872, the said whole line of railroad from Portland to Roseburg was, and continuously since has been, fully operated for all the purposes contemplated by and provided for in the said act of Congress.

17th item. Commissioners were duly appointed by the President of the United States to examine the said railroad as constructed from Portland to Roseburg; and such commissioners did duly examine all of said railroad, and thereafter duly reported to the President of the United States, under oath, that all of the said railroad had been completed and equipped in all respects as required by the act of Congress referred to in the "1st item" hereof, and that the same was ready for the service contemplated by the said act; and such reports were duly accepted and approved by the President of the United States. That the said commissioners' reports were so made, accepted and approved on the following dates: The first twenty miles, commencing at Portland, report made on December 31st, 1869, accepted and approved on January 29th, 1870; the second twenty miles, report made on October 5th, 1870, accepted and approved on February 28th, 1871; the
107 third and fourth twenty miles, report made on December 10th, 1870, accepted and approved on February 28th, 1871; the fifth twenty miles, report made on August 11th, 1871, accepted and approved on March 11th, 1872; the sixth twenty miles, report made on January 13th, 1872, accepted and approved on March 11th, 1872; the seventh, eighth, and ninth sections, including the last seventy-eight miles of the said railroad from Portland to Roseburg, report made on July 10th, 1878, accepted and approved on July 11th, 1878.

18th item. The remaining part of the railroad in Oregon contemplated and provided for by the act of Congress referred to in the "1st item" hereof, extending from Roseburg to the southern boundary of Oregon, was actually constructed, fully equipped, and made ready by the defendant company for the service contemplated by the said act, in several sections, during the years 1878 to 1889, in-

clusive, and all prior to the year 1890; and at various times prior to the last-mentioned date, commissioners, examined the same as the several sections thereof were constructed, and duly reported under oath to the President of the United States that the same had been completed and equipped in all respects as required by the said act of Congress, and that the same was ready for the service contemplated by the said act; and at various times prior to the last-mentioned date the President of the United States duly accepted and approved the said reports.

19th item. All of the lands described in paragraph II of the complainant's bill of complaint are distant more than twenty
108 miles from, but lie within thirty miles on one side of, the railroad extending from Jefferson to Roseburg, shown on the map filed on March 26th, 1870, and approved by the Secretary of the Interior on March 29th, 1870, referred to in the "8th item" hereof; and the said lands are distant more than twenty miles from, but lie within thirty miles on one side of, that portion of the railroad of the defendant company as constructed and equipped, which extends from Jefferson to Roseburg; and all of the said lands were included and embraced by the withdrawal set forth in the "9th item" hereof.

20th item. No part or portion of the lands described in paragraph II of the complainant's bill of complaint is mineral land, nor included by any exception or reservation from the indemnity land grant in Oregon made by the act of Congress referred to in the "1st item" hereof, except in so far as, if at all, they were excepted or reserved therefrom by reason of the several settlements, performances and proceedings hereinafter set forth.

21st item. The official plat of the survey of township 27 south, range 11 west, Willamette meridian, was filed in the United States land office at Roseburg, Oregon, on August 16th, 1892; and the official plats of the survey of townships 14 south and 15 south, range 8 west, same meridian, were filed in the said land office on October 19th, 1892.

22d item. On August 16th, 1892, all the lands described in paragraph II of the complainant's bill of complaint lying within the said township 27 south, range 11 west, were free and clear for selection by the defendant company as part and parcel of the indemnity
109 lands granted by the act of Congress referred to in the "1st item" hereof, except in so far as, if at all, they were excepted or reserved therefrom by reason of the several settlements, performances and proceedings hereinafter set forth; and on October 19th, 1892, all the lands in paragraph II of the complainant's bill of complaint lying within the said townships 14 south and 15 south, range 8 west, were free and clear for selection by the defendant company as part and parcel of the indemnity lands granted by the said act of Congress, except in so far as, if at all, they were excepted or reserved therefrom by reason of the several settlements, performances, and proceedings hereinafter set forth.

23d item. On November 7th, 1879, the Secretary of the Interior approved and issued a general circular of instructions relating to

the adjustment of railroad land grants, prescribing the form and procedure for the selection by railroad companies of lands within the primary and indemnity limits of land grants made by Congress to such companies; which circular has, ever since its date, remained in force and operation as to the following, among other, directions therein made by the Secretary of the Interior, relating to the lists required to be filed by railroad companies in selecting lands within the primary and indemnity limits of their land grants from Congress, to wit: "The lists must be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office. When so examined and tested and found correct in all respects, they will become final locations, and
110 you will, on the payment of the requisite fees to the receiver, so certify at the foot of each list, according to form B."

24th item. On August 16th, 1892, the defendant company filed with the register and receiver of the United States land office at Roseburg, its list No. 27, selecting the lands described in paragraph II of the complainant's bill of complaint lying in township 27 south, range 11 west, as indemnity lands granted by the act of Congress referred to in the "1st item" hereof, in lieu of lands of equal area parts of odd-numbered sections lying within the primary limits of the land grant made by the said act of Congress and otherwise disposed of by the United States prior to the passage of the said act; which list was in proper form accompanied by the fees, costs and charges required by law, and in all respects complied with and conformed to the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office; and on the same day (August 16th, 1892) the said register and receiver carefully examined the said list, and tested its accuracy by the plats and records of their office, and found the same correct in all respects, and upon payment of the requisite fees that day made to the receiver, the register and receiver on that day approved the said list, and duly certified the said list as required by law, the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office. At the time the said list was filed and approved the defendant company had not, nor has it since, selected or received any lands in
111 lieu of the lands described in the said list as the basis of the selection by it made, other than the lands so selected by the said list.

25th item. On October 19th, 1892, the defendant company filed with the register and receiver of the United States land office at Roseburg its list No. 28 selecting the lands described in paragraph II of the complainant's bill of complaint lying in township 14 south, range 8 west, as indemnity lands granted by the act of Congress referred to in the "1st item" hereof, in lieu of lands of equal area, parts of odd-numbered sections lying within the primary limits of the land grant made by the said act of Congress and otherwise disposed of by the United States prior to the passage of the said act; which list was in proper form, accompanied by the fees, costs and charges required by law, and in all respects complied with and con-

formed to the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office; and on the same day (October 19th, 1892) the said register and receiver carefully examined the said list, and tested its accuracy by the plats and records of their office, and found the same correct in all respects, and upon payment of the requisite fees that day made to the receiver, the register and receiver on that day approved the said list, and duly certified the same as required by law, the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office. At the time the said list was filed and approved the defendant company had not, nor has it since, selected or received any lands in lieu of the lands described in the said list as the basis of the
112 selection by it made, other than the lands therein selected.

26th item. On October 19th, 1892, the defendant company filed with the register and receiver of the United States land office at Roseburg its list No. 29, selecting the lands described in paragraph II of the complainant's bill of complaint lying in township 15 south, range 8 west, as indemnity lands granted by the act of Congress referred to in the "1st item" hereof, in lieu of lands of equal area parts of odd-numbered sections lying within the primary limits of the land grant made by the said act of Congress and otherwise disposed of by the United States prior to the passage of the said act; which list was in proper form, accompanied by the fees, costs and charges required by law, and in all respects complied with and conformed to the directions, rules, regulations and requirements of the Secretary of the Interior and the Commissioner of the General Land Office; and on the same day (October 19th, 1892) the said register and receiver carefully examined the said list, and tested its accuracy by the plats and records of their office, and found the same correct in all respects, and upon payment of the requisite fees that day made to the receiver, the register and receiver on that day approved the said list, and duly certified the same as required by law, the directions, rules, regulations, and requirements of the Secretary of the Interior and the Commissioner of the General Land Office. At the time the said list was filed and approved the defendant company had not, nor has it since, selected or received any lands in
113 lieu of the lands described in the said list as the basis of the selection by it made, other than the lands therein selected.

27th item. On September —, 1889, Charles S. Seely, a duly qualified entryman under the homestead laws of the United States, settled upon the N. ½ of N. W. ¼ of section 19, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barns, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $700. On November 12th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Charles S. Seely, in good faith, filed his application in the said land office to make homestead entry in

his name of and for the said land, under the homestead laws of the United States.

28th item. On October 15th, 1889, John W. Carey, a duly qualified entryman under the homestead laws of the United States, settled upon the N. E. ¼ of N. E. ¼ of section 19, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $500. On October 27th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the
114 United States land office at Roseburg, the said John W. Carey, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

29th item. On April 26th, 1890, Francis W. Huddleston, a duly qualified entryman under the homestead laws of the United States, settled upon the S. W. ¼ of S. E. ¼ of section 18, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same in connection with the W. ½ of N. E. ¼ and and N. W. ¼ of S. E. ¼ of section 19, in the same township and range; and from the date of his settlement to the commencement of this suit continued to reside upon the said S. W. ¼ of S. E. ¼ of section 18, and made improvements thereon in the way of a dwelling-house, barns, outhouses, fencing, clearing and the planting of fruit trees, which cost, in all, about $800; and during all of that time he used the said W. ½ of N. E. ¼ and N. W. ¼ of S. E. ¼ of section 19 as pasture land. On November 12th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Francis W. Huddleston, in good faith, filed his application in the said land office to make homestead entry in his name of and for all of the said land, under the homestead laws of the United States.

30th item. On July —, 1885, Charles E. Banton, a duly qualified entryman under the homestead laws of the United States, settled upon the N. E. ¼ of N. W. ¼, W. ½ of N. W. ¼, and N. W. ¼ of S. W. ¼ of section 25, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same, and
115 from the date of his settlement to the commencement of this suit continued to reside upon the said land off and on, but making it his home, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Charles E. Banton, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land under the homestead laws of the United States.

31st item. On July —, 1883, Uriah W. Wren, a duly qualified entryman under the homestead laws of the United States, settled

upon the W. ½ of S. E. ¼, N. E. ¼ of S. W. ¼, and S. E. ¼ of N. W. ¼ of section 25, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost in all, about $2,000. On November 12th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Uriah W. Wren, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

32d item. On September 17th, 1888, Joseph A. Cox, a duly
116 qualified entryman under the homestead laws of the United States, settled upon the S. ½ of S. E. ¼, N. W. ¼ of S. E. ¼, and S. E. ¼ of S. W. ¼ of section 33, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $300. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Joseph A. Cox, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

33d item. On April —, 1882, George C. Peek, a duly qualified entryman under the homestead laws of the United States, settled upon the S. ½ of S. W. ¼ and N. W. ¼ of S. W. ¼ of section 5, in township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barns, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said George C. Peek, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

117 34th item. On August 10th, 1890, Alfred R. Young, a duly qualified entryman under the pre-emption laws of the United States, settled upon the S. E. ¼ of N. E. ¼ of section 5, township 15 south, range 8 west, Willamette meridian, intending to make pre-emption entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,200. On December 9th, 1892, and within

ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Alfred R. Young, in good faith, applied to file a pre-emption claim in the said land office in his name for the said land, under the pre-emption laws of the United States.

35th item. During the year 1878, Abram M. Peek, a duly qualified entryman under the homestead laws of the United States, settled upon N. ½ of S. E. ¼, N. E. ¼ of S. W. ¼ and S. E. ¼ of N. W. ¼ of section 5, in township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing and the planting of trees, which cost, in all, about $1,700. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg,

the said Abram M. Peek, in good faith, filed his application
118 in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

36th item. During the year 1878, J. R. Peters, a duly qualified entryman under the homestead laws of the United States, settled upon the N. W. ¼ of N. E. ¼ of section 7, in township 14 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwel' ng-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said J. R. Peters, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

37th item. On October —, 1878, John Sapp, a duly qualified entryman under the homestead laws of the United States, settled upon the N. ½ of N. W. ¼ of section 7, in township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On October 22d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the

United States land office at Roseburg, the said John Sapp,
119 in good faith, filed his application in the said land office to make homestead entry in his name for the said land under the homestead laws of the United States.

38th item. On May 28th, 1885, Baxter W. Jenkins, a duly qualified entryman under the homestead laws of the United States, settled upon the S. E. ½ of N. E. ¼ and N. E. ¼ of S. E. ¼ of section 9,

township 15 south, range 8 west, Willamette meridian, intending to make homestead entry of the same, and from the date of his settlement to the commencement of this suit continued to reside upon the said land, and made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing, and the planting of trees, which cost, in all, about $1,500. On November 3d, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, the said Baxter W. Jenkins, in good faith, filed his application in the said land office to make homestead entry in his name of and for the said land, under the homestead laws of the United States.

39th item. On October —, 1869, Louis Heller, a qualified entryman under the homestead laws of the United States, settled upon the S. ½ of S. E. ¼, N. E. ¼ of S. E. ¼, and S. E. ¼ of N. E. ¼ of section 27, in township 27 south, range 11 west, Willamette meridian, intending to make homestead entry of the same; and from the date of his settlement until October —, 1889, he continued to reside upon and cultivate the said land, at which last-mentioned date he died; and after his death his widow and children continued to reside upon the said land; and he and his wife and
120 children made improvements thereon in the way of a dwelling-house, barn, outhouses, fencing, clearing and planting of fruit trees, of the value of about $3,000. On October 25th, 1892, and within ninety days after the official plat of the survey of the said land was filed in the United States land office at Roseburg, Charles Heller, one of the sons and heirs-at-law of the said Louis Heller, deceased, duly tendered in the said land office his filing for the benefit of all the heirs-at-law of the said Louis Heller, deceased, as a homestead, for all of the said land.

40th item. That the said selection lists No. 27, 28, and 29, set forth in the 24th, 25th and 26th items hereof, were presented to and approved by the Commissioner of the General Land Office and the Secretary of the Interior; and thereafter, on February 20th, 1893, a patent was issued by the proper officers of the United States conveying all the lands described in the complainant's bill of complaint as amended, and herein, to the defendant company; but at the times when the said list was presented to and approved by them as aforesaid neither the Commissioner of the General Land Office nor the Secretary of the Interior had any knowledge of the adverse claims of the said Charles S. Seeley, John W. Carey, Francis W. Huddelston, Charles E. Banton, Uriah W. Wren, Joseph A. Cox, George C. Peck, Alfred R. Young, Abram M. Peck, J. R. Peters, John Sapp, Baxter W. Jenkins, or Charles Heller to the said lands.

41st item. On October 27th, 1893, the land grant made by the act of Congress referred to in the "1st item" hereof was unadjusted, and the Secretary of the Interior regarding the patent referred to in the "40th item" hereof as having been erroneously issued, di-
121 rected the Commissioner of the General Land Office to demand reconveyance as provided by statute; and in accordance with such directions the Commissioner of the General Land Office did, on that day (October 27th, 1893), duly demand of the

defendant company a reconveyance of the lands conveyed by the said patent, and the said company refused, and still refuses, to make such reconveyance.

42d item. That the defendant company claims to be the owner of all the lands conveyed by the patent referred to in the "40th item" hereof, by title in fee-simple absolute; and it withholds all of the said lands from the complainant.

Now therefore, on motion of Mr. John H. Hall, United States attorney for the district of Oregon, and predicated upon said findings of fact, heretofore made and entered, it is ordered, adjudged, and decreed that the patent issued by the President of the United States, on February 20th, 1892, to the Oregon & California Railroad Company, to the following-described lands, to wit:

The north half of the northwest quarter of section seven (7), township fifteen (15) south, range eight (8) west, of the Willamette meridian; the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section nine (9), township fifteen (15) south, range eight (8) west, of the Willamette meridian; the south half of the southeast quarter, and the northeast quarter of the southeast quarter, and the southeast quarter of
122 the northeast quarter of section twenty-seven (27), township twenty-seven (27) south, range eleven (11) west, of the Willamette meridian; the north half of the northwest quarter of section nineteen (19), township fourteen south, range eight (8) west, of the Willamette meridian; the northwest quarter of the northeast quarter of section seven (7), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the south half of the southeast quarter, and the northwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of section thirty-three (33), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the northeast quarter of the southeast quarter of section nineteen (19), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the west half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the north half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian; the southeast quarter of the northeast quarter of section five (5), township fifteen (15) south, range eight (8) west, of the Willamette meridian; the west half of the northeast quarter, and the northwest quarter of the southeast quarter of section
123 nineteen (19), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the northeast quarter of the northwest quarter, and the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-five (25), township fourteen (14) south, range eight (8) west, of the Willamette meridian; the south half of the southwest quarter, and the northwest quarter of the southwest quarter of section five (5),

township fifteen (15) south, range eight (8) west of the Willamette meridian; be, and the same is hereby, decreed to be set aside, canceled, and held to be null and void, and the legal title thereto to be restored to vest in the United States of America, and that the plaintiff herein do have and recover of and from defendant its costs and disbursements of this suit, taxed at $—.

CHARLES B. BELLINGER, *Judge.*

Filed June 15, 1900.

J. A. SLADEN, *Clerk.*

And afterward, to wit, on the 11th day of August, 1900, there was duly filed in said court a petition for appeal and supersedeas, in words and figures as follows, to wit:

124 In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2272.

Petition for Allowance of Appeal and Supersedeas.

The defendant in the above-entitled suit, conceiving itself aggrieved by the decree made and entered herein on June 15th, 1900, granting unto the complainant the relief prayed for in its bill of complaint, hereby appeals from the said decree to the United States circuit court of appeals for the ninth circuit; and the defendant files herewith its assignment of errors asserted and intended to be urged on appeal.

The defendant prays an order of this court allowing its appeal, and directing that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit; and that by the order of this court all further proceedings in
125 this cause, and upon said decree, may be stayed pending this appeal, upon its (defendant's) giving a good and sufficient bond to be approved by this court.

Dated and signed on August 11th, 1900.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for Defendant.

WM. F. HERRIN,
Counsel for Defendant.

Filed August 11, 1900.

J. A. SLADEN, *Clerk.*

And afterward, to wit, on the 11th day of August, 1900, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2272.

Assignment of Errors.

In connection with its petition for allowance of appeal herein, the defendant makes and files this assignment of errors made by
126 the court, in its decree entered in this cause on June 15th, 1900.

It is stipulated by counsel, and found in the decree, that none of the lands in suit are mineral lands, nor included by any exception or reservation from the indemnity grant made to the defendant by the act of July 25th, 1866, except in so far as, if at all, they were excepted or reserved therefrom by reason of the several filings and settlement claims set forth in the bill and decree (20th item, decree); in other words, it is, in effect, agreed by the parties and found by the court that the lands in suit were properly patented to the defendant, unless the issue of such patent was rendered unlawful by those filings and settlement claims. In adjudging and decreeing the defendant's patent null, void, set aside and canceled, and the lands thereof restored to the United States, the court erred as follows:

1st. Because the said act of July 25th, 1866, granted *in presenti*, and immediately transferred unto and conferred upon the defendant a vested right to select the lands in suit in part satisfaction of the amount of land granted; and all of the said filings were made, and settlements initiated, subsequent to the said grant, subsequent to definite location of the defendant's railroad, and subsequent to the construction and acceptance of the defendant's railroad.

2d. Because, as stipulated and found, defendant's map of survey and definite location was duly accepted and approved by the Secretary of the Interior on March 26th, 1870. Thereupon, on that date, the lands in suit were, by the force and effect of the said act,
127 reserved, set apart and withdrawn for the purposes of, and to satisfy, the defendant's grant, and have ever since so remained; hence none of said lands were public lands, nor subject to the said settlements or filings, at any of the times when such settlements or filings were made.

3d. Because, as shown by defendant's undisputed evidence, all the odd sections, and parts of odd sections, within both primary and indemnity limits of the defendant's grant, not finally disposed of by the United States otherwise than to the defendant, are insufficient to make or equal the amount or quantity of land granted. Therefore all the lands in suit were granted to the defendant by force and effect of the said act, without any selection thereof being required; hence none of the lands in suit were public lands, nor subject to the said

settlements or filings, at any of the times when such settlements or filings were made.

4th. Because, as stipulated and found, the defendant selected the lands in suit in accordance with the instructions and directions of the Secretary of the Interior; and at all the times when such selections were filed and approved by the register and receiver of the United States land office, none of the said filings or entries had been tendered or made. Hence all the pre-emption and homestead filings set forth in the bill and decree were unlawfully permitted, and were null and void *ab initio*.

5th. Because, as stipulated and found, the defendant's map of definite location was accepted and approved by the Secretary of the Interior on March 26th, 1870, and due notice of withdrawal by the Secretary of the Interior of the lands in suit was received at
128 the proper local land office of the United States on April 25th, 1870; hence none of the settlement claims set forth in the bill and decree are within the provisions of the act approved April 21st, 1876, referred to in the said bill.

6th. Because, as stipulated and found, the defendant's railroad from Portland to Roseburg, through and beyond all the lands in suit, was fully constructed and equipped prior to December 4th, 1872, and continuously after that date was operated for all the purposes contemplated by and provided for in the said granting act; and that portion thereof extending through and beyond all the lands in suit except the tract described in the "39th item" of the decree, was finally accepted by the United States prior to March 12th, 1872. For these further reasons the said act approved April 21st, 1876, is in nowise applicable to the settlement claims set forth in the bill and decree.

7th. Because, as stipulated and found, each homestead claim set forth in the bill and decree was filed during the year 1892; hence none of such homestead claimants can lawfully allege settlement prior to the act of Congress approved on May 14th, 1880 (21 U. S. Stat. 141).

8th. Because, as shown by the facts stipulated and found, the United States has no such interest in the relief prayed for or given by the decree as will maintain this suit or sustain the decree.

9th. Because, as shown by the facts stipulated and found, the decree should have been for defendant as prayed, with costs.

Wherefore, the defendant (appellant) prays that the decree entered herein be reversed, that the complainant's bill be dismissed,
129 and that it (defendant) be given the relief prayed.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendants.

Filed August 11, 1900.

J. A. SLADEN, *Clerk.*

And afterward, to wit, on Saturday, the 11th day of August, 1900, the same being the 106th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2272.

Order Granting Appeal and Supersedeas.

Having considered the defendant's petition for the allowance of appeal and supersedeas from the decree made and entered herein on June 15th, 1900, and the assignment of errors filed therewith, on motion of Mr. Wm. D. Fenton, of counsel for the defendant,
130 the appeal of the defendant is allowed as prayed, upon giving a bond to be approved by this court, in the sum of $500.00; which bond shall operate as a supersedeas from the date of its approval.

And it is further ordered that a transcript of the record, proceedings, and papers upon which the said decree was made, duly authenticated, be sent by the clerk of this court to the United States circuit court of appeals, ninth circuit, at San Francisco, California.

Dated and signed on August 11th, 1900.

CHARLES B. BELLINGER, *Judge.*

Filed August 11, 1900.

J. A. SLADEN, *Clerk.*

And afterward, to wit, on the 13th day of August, 1900, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2272.

Bond on Appeal.

We, R. Koehler and C. G. Sutherland, each of Portland, Oregon, are held and firmly bound unto The United States, com-
131 plainant above named, in the sum of $500.00, to be paid unto the said complainant; for the payment of which, well

and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The Oregon & California Railroad Company, defendant above named, has been allowed an appeal to the United States circuit court of appeals for the ninth circuit, and supersedeas, from the decree entered in the above-entitled suit on June 15th, 1900; and the condition of this obligation is, that if the said Oregon & California Railroad Company shall prosecute its appeal to effect, and answer the costs taxed in the decree appealed from, together with all damages, interest, and cost of such appeal and supersedeas, if it (defendant) fails to make its said appeal good, then this obligation to be void; otherwise to remain in full force.

Dated, signed and sealed on August 11th, 1900.

R. KOEHLER. [SEAL.]
C. G. SUTHERLAND. [SEAL.]

STATE OF OREGON, } ss:
County of Multnomah, }

R. Koehler and C. G. Sutherland, being duly sworn, each for himself says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident of, and freeholder within, the State and district of Oregon, and am worth the sum of $500.00 over and above all my just debts and liabilities, in property situated in said district, exclusive of property exempt from execution.

R. KOEHLER.
C. C. SUTHERLAND.

132 Subscribed and sworn to before me on August 11th, 1900.

[SEAL.] DAVID LORING,
Notary Public in and for Multnomah County, Oregon.

The foregoing bond approved on August 13th, 1900.

CHARLES B. BELLINGER, *Judge.*

Filed August 13, 1900.

J. A. SLADEN, *Clerk.*

And, to wit, on the 10th day of March, 1900, there was duly filed in said court, depositions in words and figures as follows to wit:

Circuit Court of the United States, Ninth Circuit, District of Oregon.

UNITED STATES OF AMERICA, Complainant, vs. OREGON & CALIFORNIA RAILROAD CO., Defendant.	Nos. 2272, 2273, 2405, 2422.

Stipulation to Take Testimony.

It is stipulated and agreed by the undersigned, as follows:

That the testimony for the defendant in the above-entitled cases may now be taken at San Francisco, California, by Clement
133 Bennett, as special examiner; and that *nunc pro tunc* orders may be entered in the above-entitled court and cases, by consent, appointing Mr. Clement Bennett such special examiner, to take and report the testimony herein specified.

It is further agreed that the testimony under this stipulation shall be taken at the office of Wm. Singer, Jr., rooms 61 and 62, Union Trust building, San Francisco, California, commencing on February 20, 1899, and continuing from day to day until completed; and shall be reported in one record applicable alike to the four cases, as may be, and filed with the clerk of the above-entitled court, within twenty days after the taking thereof shall have been completed.

It is further agreed that caption and all formalities are waived; and that the testimony so to be taken shall, when reported, be deemed regular in all respects, and have the same force and effect as if the said Clement Bennett had been heretofore duly appointed such special examiner, and the testimony taken within the district of Oregon. The testimony so reported to be deemed evidence alike in the four cases, subject to such objections as may be made in the course of taking the same.

Dated and signed on February 20th, 1899.

JOHN H. HALL,
United States Attorney for the District of Oregon.
WM. SINGER, JR.,
Attorney for the Defendant.

134 Circuit Court of the United States, Ninth Circuit, District of Oregon.

UNITED STATES OF AMERICA, Complainant, *vs.* OREGON & CALIFORNIA RAILROAD CO., Defendant.	Nos. 2272, 2273, 2405, 2422.

Testimony.

Testimony taken on behalf of the defendant by and before Clement Bennett, special examiner and stenographer, in pursuance of the foregoing stipulation, at the office of Wm. Singer, Jr., rooms 61 and 62, Union Trust building, San Francisco, California, commencing on Monday, February 20, 1899.

Present: Mr. John H. Hall, United States attorney for the district of Oregon, attorney for the complainant, and Mr. Wm. Singer, Jr., attorney for the defendant.

Thereupon the following proceedings were had:

Testimony of Wm. Singer, Jr.

WM. SINGER, JR., called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

135 The WITNESS: I am general attorney for the respective railroad companies owning the land grants made to the Southern Pacific Railroad Company, the Central Pacific Railroad Company, the California & Oregon Railroad Company, the Oregon & California Railroad Company, and the Oregon Central Railroad Company. In the year 1867, when I was about sixteen years of age, I became a clerk in the United States land office at Marysville, and continuously since that time, with the exception of about four years, when I served in the county clerk's office, I have been either a clerk in the United States land office, or a practitioner, in extensive and active practice, in the United States land offices. In August, 1878, I became land-office attorney for the California & Oregon grant, extending from Roseville Junction, on the line of the Central Pacific railroad, to the boundary line between Oregon and California. Prior to that time, however, I had done considerable work for the railroad company. About that time, I commenced making a set of title books of the California & Oregon railroad grant, for the use of the Central Pacific Railroad Company in transacting its land business under that grant, from the Marysville and Redding land offices. The abstract books which I then made in 1878, or 1879, as since added to by abstracts made by me, or under my supervision, are the books which have ever since been the basis for the transaction of the company's business under that land grant. In 1879 I made abstracts of the Central Pacific Company's land grant in the Territory of Utah. Up to that time the company had no record books whatever in respect of its land grant in

Utah. The books made from the abstracts then prepared by me are the ones now in use, and which have been in
136 continuous use since I made them. After that, I made an abstract of the Central Pacific grant in the State of California, from the records of the United States land offices; and the books made from those abstracts constitute the basis on which the company does its business under that land grant. At the time of making these abstract books, I was entirely familiar with the United States Government system of book-keeping, with the rules and regulations of the Land Department, and with the decisions made by the Land Department. Under these rules and regulations the railroad companies are required to prepare what are known as selection lists, and they cannot, under the system, procure patent for any tract of land until after such lists have been made and approved. The rules and regulations in respect to those lists require that they be without interpolation or erasure, and if, when presented, they are found to contain a single tract erroneously, not patentable to the company, they are sent back for correction—which necessitates a rewriting. The lists are gotten up in five editions, and before they are presented to the local land officers for approval, we pay the costs of survey into the Treasury of the United States; and in paying it in, a specification of the particular list, by its serial number, and the land office in which it is to be filed, is given. The rejection of the list, therefore, not only involves the labor and expense of rewriting of the lists, but frequently leaves the company with an excess payment in the Treasury, the rewritten lists containing a lesser quantity of land to the extent of the area of the tracts erroneously included in the rejected lists. I speak of this to show you, Mr. Hall, how very careful I
137 should have been, and was, in making these abstracts of title; and I have spoken first of my abstracts other than those of the Oregon grants, that I may in that connection give the result of our experiences with them, for such suggestion as it may carry as to the probable accuracy of my Oregon abstracts. I do not remember of a list made out from my books in Utah, having been rejected for an error—although I am not prepared to say that none ever were rejected for that reason; but they have proved remarkably correct. As to the Oregon & California grant, the lists are generally found correct when presented, and there have been but few occasions for rejecting them because of differences between our records and the United States Land Office records.

And now as to my abstracts of the Oregon & California grant and the Oregon Central grant: They were made, I believe, in the year 1889—somewhere between 1888 and 1890. I went to Oregon for that purpose, with a force of five or six competent clerks, familiar with land office book-keeping. Before going to Oregon, I had procured from the General Land Office at Washington certified copies of the limit-lines maps, showing the finally adjusted twenty and thirty mile limit lines of the Oregon & California grant, and the finally adjusted twenty and twenty-five mile limit lines of the Oregon Central grant. From those certified copies *I procured to — made*

this map, which I will exhibit to you, Mr. Hall, and will request the examiner to mark it for identification "Defendant's Exhibit No. 1."

(The map is marked "Defendant's Exhibit No. 1. Clement Bennett, special examiner.")

138 Mr. HALL:

Q. I will ask you, Mr. Singer, whether or not "Defendant's Exhibit No. 1" is a correct copy of maps on file in the Land Department at Washington.

A. It is. It is a correct representation of limit lines shown upon maps procured by me from the office of the Commissioner of the General Land Office, and certified to by the Commissioner. I will say, also, that the limit lines, as marked on this map, were compared with the United States Land Office maps in the local land offices at Oregon City, Roseburg and Lakeview, and in instances where they differed from those maps, inquiries were made through our attorneys at Washington as to which were correct, and the true lines thus ascertained were platted on this map, "Defendant's Exhibit No. 1."

Q. For what purpose was the map caused to be made by the defendant company?

A. As the basis of the abstracts which I was to make, and did afterward make, of the two grants mentioned. It was for the purpose of ascertaining, technically and nicely, just what tracts of land were within the primary limits, and what tracts of land were within the indemnity limits, of these two grants.

Q. Was it not made with a view of being used as an exhibit in this or other suits or actions between the company and the United States Government?

A. It was made solely for the information and use of the company's land department, in order that they might have absolutely correct records—without any thought of suit; and it has been used ever since it was made, about 1889, and acted upon by our land department, as truly and correctly showing the limit lines of those grants.

139 Mr. HALL: The plaintiff consents that the said map marked "Defendant's Exhibit No. 1" may be admitted and used in evidence in the foregoing cases, subject, however, to the right of the plaintiff to check up and determine the accuracy of said exhibits. That will be satisfactory.

The WITNESS: Except that the map is in daily use here, and could — be spared for a long time.

Mr. HALL: I have a copy of it.

The WITNESS: With this map as a basis, showing the limit lines, I commenced work with my force in the United States surveyor general's office at Portland, Oregon, and made township plats of each township shown to be within the limits on this map; which plats made by me were true copies of the official maps on file in the surveyor general's office. After I had finished the township plats and marked upon them the limit lines, I went with my force to

Oregon City, and we were given access to the United States land office at nights; and with this force I abstracted all filings and entries, and all matters which in anywise could affect the status of the odd sections within the limits of either of the two grants—the Oregon & California and the Oregon Central. These abstracts were checked up by the clerks reading in my presence; and the sheets upon which they were made were all marked with my symbol, to indicate such examination, and that abstracts were correct. From those abstract notes I prepared the tract books from which our company has ever since conducted its business of listing lands and selling lands. Those tract books show generally two sections to the
140 page, and in so far as the lands have not been disposed of by the Government, otherwise than to the railroad company, each section is thrown out into its smallest legal subdivisions; so that a square section of 640 — represents sixteen lines of the tract book. These tract books are 17 by 22 inches in size, contain about 500 pages each, and there are thirteen books and five adverse-claim books, comprising the set of books showing the Oregon & California grant; and there is one tract book and one adverse-claim book, making the set of Oregon Central land-grant books.

In addition to the books mentioned, a set of lieu books, which I will now exhibit, and ask to be marked for identification as Defendant's Exhibits respectively Nos. 2, 3, 4, 5, 6, and 7, were made up from my abstracts. They are known in our company's land office as lieu books of the Oregon & California grant. Five of the books run out by subdivision, section, township, range, and acres, all lands comprising such parts of odd sections within the primary limits of the grant as are covered by adverse claims; and against the description is written the particular adverse claim affecting the tracts, by reference to land-office numbers, dates, etc. The sixth book is a similar book of lands disposed of otherwise than to the railroad company by the United States, within the indemnity limits of the grant. The purpose of these books is to show the particular tracts in the primary limits of the grant, excepted or lost to the company therefrom by governmental disposition; such tracts to be used as basis in making indemnity lieu selections. The indemnity lieu books are for the purpose of showing, by items, the particular
141 lands within the indemnity limits that have been disposed of by the Government otherwise than to the railroad company; and they contain an abstract of all filings and entries actually permitted by the United States land officers, without regard to whether, in our opinion, lawfully or unlawfully permitted.

(The books are marked "Exibits 2, 3, 4, 5, 6, and 7. Clement Bennett special examiner.")

Mr. HALL: The plaintiff objects to the introduction of Defendant's Exhibits marked 2, 3, 4, 5, 6 and 7, on the grounds, first that the evidence contained therein is incompetent, irrelevant and immaterial; second, that said books appear to be copies of originals, and are not the best evidence. This objection, however, will be

withdrawn with the approval of the Attorney General of the United States first being obtained.

Mr. SINGER: In support of our claim that these copies are primary evidence, under the circumstances, being the best and only evidence available to the defendants—the originals being in the custody of the complainant, and no offer having been made to produce them—I wish to say: During February or March, 1898, I gave Mr. Schnabel, assistant United States attorney for Oregon and of attorneys in this case, a copy of the statement now offered as "Defendant's Exhibit No. 8," exhibiting the results shown by the defendant's land books about which I have testified, to be compared with the original public records relating to the lands subject of the statement; and it was then agreed between Mr. Schnabel and myself, with the approval of United States Attorney Murphy, that no objection would be interposed to our records, or testimony therefrom, unless
142 comparison in the General Land Office showed the statement given by him to be materially different from the results shown by the original records of the United States. This understanding was reached after a full discussion of the situation, and mutual appreciation of the impracticability of the complainant producing the original records if demanded; the impossibility of the defendant producing the originals, and the impracticability of the defendant's procuring authenticated copies thereof—because of the enormous volume and expense of such copies. In view of the objections now made by counsel, we demand that the complainant make answer under oath or certificate of its proper officers, whether the statements to be hereinafter introduced as part of the testimony of F. C. Radcliffe are true and correct as such matters are shown by the original records, stating in such answer in what respect and to what extent, if at all, such statements are incorrect; or that the complainant produce the original records of surveys, filings, entries and other dispositions and reservations of odd sections within the limits of the said Oregon & California and Oregon Central land grants, together with the maps of limit lines thereof. And we now give notice that upon failure of the complainants to make such answer, or to produce the said original records, within a reasonable time, we will ask an order of this court admitting the testimony taken at this hearing *nunc pro tunc*, with the same effect as if taken after notice to produce the said original records.

(The statement referred to by the witness is marked "Defendant's Exhibit 8. Clement Bennett, special examiner.")

143 Cross-examination.

Mr. HALL:

Q. Mr. Singer, for what purpose were those books and abstracts made; that is to say, were they made for the private use of defendant in dealing with its lands obtained under the grants referred to, or were they made with a view to being used as exhibits in suits or actions between the United States and defendant relative to these granted lands?

A. They were made exclusively for the use of the company in transacting its business, by selection and otherwise, with the General Government, and by sale and otherwise with its purchasers. At that time there was no suit pending by the Government against the company involving these land grants, and the books were not prepared with any view of being introduced in evidence in any case. In fact, litigation was not thought of in making them.

Q. Were these books prepared under you immediate supervision and direction?

A. They were. I did a very large share of the original work of abstracting personally, and checked up, from the original abstracts personally; being personally present during the time they were made, in the Oregon land offices.

Q. What is your judgment at this time, Mr. Singer, as to whether or not these books are accurate and correct copies of the original.

A. In my opinion, they are remarkably correct. A few instances have been found of errors, but the errors likely to occur in them are
of further loss by some entry in the land office which we
144 overlooked. But few others have been found in our experiences, doing business from our books.

Q. Would it be possible, or probable, that the said books and abstracts would show a greater loss of lands within either place or indemnity limits than has actually occurred to defendant?

A. It is possible, but not probable. Each abstract is of a filing or an entry, and of the items of such filing or entry, and it is not at all likely that we would have filings and entries on our abstracts not shown by the land-office records; although it is probable that a filing or entry—or several, for that matter—may have escaped observation, so that I would expect any errors in the books to result in a greater loss to the company than that shown by our abstracts.

WM. SINGER, JR.

Testimony of F. C. Radcliffe.

F. C. RADCLIFFE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Mr. SINGER:

Q. What is your occupation?

A. Clerk in charge of the title books and records in the office of Mr. William H. Mills, land agent for the Oregon & California Railroad Company.

Q. Are the books about which I testified, marked for identification as "Defendant's Exhibits No. 2 to No. 7," in your custody?

A. They are.

Q. Is the map showing the limit lines of the Oregon &
145 California and Oregon Central land grants, marked for identification as "Defendant's Exhibit No. 1," also in your custody?

A. It is.

Q. Have you also in your custody the tract books and lieu books of the Oregon Central land grant, about which I testified?

A. Yes, sir.

Q. Do those lieu books, in connection with the map, "Defendant's Exhibit No. 1," disclose the quantity of lands granted to the Oregon & California Railroad Company, and to the Oregon Central Railroad Company, with the quantities of land within the primary and indemnity limits of those two grants disposed of by the Government otherwise than to the railroad company?

A. They do.

Q. Have you a statement of the quantity of lands granted under those two grants respectively, and the quantity of lands disposed of by the Government within the primary and indemnity limits thereof?

A. Yes, sir.

Q. Will you please give to the examiner, to be entered by him as part of your testimony, a statement of the condition of the Oregon & California grant in respect of quantity granted and quantity within the grant, to supply the amount granted, as shown by the record books mentioned?

A. Yes, sir, I will.

Mr. HALL: I object to the question as incompetent, irrelevant and immaterial, and I also object to the witness testifying from the record.

(The statement handed in by the witness is as follows:)

146 *Status of the Oregon and California Grant.*

February 20, 1899.

Primary limits:

Total acres in grant, surveyed	3,419,283.80
Total acres in grant, unsurveyed	396,555.00
Total area of primary grant	3,815,838.80

Disposed of by the United States Otherwise Than to the O. & C. R. R. Co.

Finally disposed of by pre-emption, homestead, donation and mineral entries and patents; swamp and State selections, approvals and patents; wagon-road approved lists and patents; adjudged mineral land; and covered by pre-emption and homestead filings and donation notifications of record and uncanceled at date of definite location or date of grant		1,730,566.14
147 Within limits of wagon-road, grants, not approved to the wagon-road companies		13,366.08

Within limits of unsurveyed mining claims of which segregation surveys are required, the acreage of the legal subdivision being	277.14	
Unsurveyed lands within limits of wagon-road grants	2,680.00	
Total acres disposed of		1,746,889.36
Remainder apparently clear to R. R. Co.		2,068,949.44

Status of the Oregon and California Grant.

February 20, 1899.

Indemnity limits:

Total acres, surveyed	1,174,637.29
Total acres, unsurveyed	611,030.00
Total area of indemnity grant	1,785,667.29

148 *Disposed of by the United States Otherwise Than to the O. & C. R. R. Co.*

Finally disposed of by pre-emption, homestead, donation and mineral entries and patents; swamp and State selections, approvals and patents; wagon-road approved lists and patents; set apart for Indian reservations; adjudged mineral land; and covered by homestead and pre-emption filings and donation notifications of record and uncanceled	276,253.22	
Within limits of wagon-road, grants, not approved to the wagon-road companies	1,360.12	
Within limits of forest reservations not patented to R. R. Co.	34,847.23	
Within limits of unsurveyed mining claims of which segregation surveys are required, the acreage of the legal subdivisions being	197.63	
Unsurveyed lands within limits of forest reservations and wagon-road grants	182,200.00	
Total acres disposed of		494,858.20
Available to satisfy deficiency in primary grant		1,290,809.09

149 *Status of the Oregon and California Grant.*

February 20, 1899.

Summary:

Total area in primary limits		3,815,838.80
Total acres clear to Co. primary	2,068,949.44	
Total acres clear to Co. indemnity	1,290,809.09	
Total available for satisfaction of grant		3,359,758.53
Net deficiency		456,080.27

Note.

In the foregoing statements, unsurveyed lands are estimated at 640 acres to the section.

Mr. SINGER:

Q. According to this statement, I observe that the net deficiency of the Oregon & California grant, because of dispositions of land made by the Government otherwise than to the company, is 456,080.27 acres at this time. About what was the quantity, if you can state it, lost to the company in that way in excess of the undisposed of lands within the primary and indemnity limits of the grant at the time the definite location of the road was perfected?

150 Mr. HALL: Same objection.

A. I have not the figures to give that amount exactly.

Mr. SINGER:

Q. Can you state it approximately?

A. I think not to exceed 50,000 acres.

Q. Then, the deficit at the time the definite location of the road was completed was within about 50,000 acres of what is shown by this statement that you have submitted to the special examiner?

A. Exclusive of the amount in the forest reservation.

Q. Does this statement include the lands involved in the suit by the United States against the company to try title to the land in the Northern Pacific overlap, as railroad lands or as lost lands?

A. As railroad lands, not lost.

Q. You have in your statement here counted all that land as belonging to our company and not lost to it?

A. Not lost to it by reason of the Northern Pacific grant. There may possibly be a little here and there that is lost to it through filings.

Q. Have you a statement of the quantity granted and the quantity disposed of by the Government otherwise than to the company within the limits of the Oregon Central grant?

A. I have.

Q. Please give that to the examiner to be copied into the record as part of your testimony.

A. I will.

Mr. HALL: Same objection.

(The statement handed in by the witness is as follows:)

151 *Status of Oregon Central R. R. Grant.*

February 20, 1899.

Primary limits:

Total acres in primary grant	408,939.54
Disposed of by the United States Otherwise Than to the O. C. R. R. Co., to wit:	
Finally disposed of by pre-emption, homestead and donation entries and patents; swamp and State selections, approvals and patents by O. & C. R. R. Co. selections and patents, and covered by homestead and pre-emption filings and donation notifications of record and uncanceled at date of grant or date of definite location	311,691.31
Remainder apparently clear to R. R. Co	97,288.23

Status of Oregon Central R. R. Grant.

February 20, 1899.

Indemnity limits:

Total acres in indemnity grant	114,885.83
Disposed of by the United States Otherwise Than to the O. & C. R. R. Co., to wit:	
Finally disposed of by pre-emption, homestead and donation entries and patents; swamp and State selections, approvals and patents, and covered by homestead and pre-emption filings and donation; notifications of record and uncanceled	76,323.64
Available to satisfy deficiency in primary grant	38,562.19

152 *Status of Oregon Central R. R. Grant.*

February 20, 1899.

Summary:

Total area in primary limits		408,939.54
Total area clear to Co. primary limits	97,288.23	
Total area clear to Co. indemnity limits	38,562.19	
Total available for satisfaction of grant		135,850.42
Net deficiency		273,089.12

Mr. SINGER:

Q. Did you prepare a statement about one year ago as to the condition of the Oregon & California grant similar to the one you have just handed the special examiner?

A. Yes, sir.

Q. Do you remember about what date you prepared that other one?

A. My recollection now is that I have prepared two, one about a year ago, and one about a year and a half. One in May, 1897. That was the first one.

Q. The one prepared in May, 1897, had nothing to do with this suit?

A. No, sir.

Q. It was prepared for the purposes of the company, independent of any litigation?

A. Yes, sir.

153 Q. Did you prepare the statement I now offer you, bearing date February 14, 1898, marked "Defendant's Exhibit No. 8"? (Showing.)

A. Yes, sir.

Q. Do you remember whether you made more than one copy of it?

A. I did; I made two—at least two.

Q. At whose request did you make that?

A. At yours.

Q. Is there any difference in the net deficiency of the Oregon & California grant, shown upon this statement of February 14, 1898, and that shown upon the statement which you have just submitted?

A. There is.

Q. To what is the difference due?

A. It is due to the fact that in the statement of February 14, 1898, was included as lost from the primary limits, lands within the forest reservation. That has been left off of the present statement, the statement of February 20, 1899.

Q. That was erroneously put upon the other statement, then. I called your attention to the fact, did I not, that it did not belong there?

A. Yes, sir.

Q. Is there any other cause of a difference between the net showing of the two?

A. I think no other, except possibly a few errors which have been corrected, and some lands decided mineral by the Commissioner during the past year; possibly a very few filings allowed in the indemnity limits that are included in the statement of February 20, 1899.

Q. As a matter of fact, has the Government disposed of any odd-numbered sections during the past year within the limits of the Oregon & California grant, not covered by any filing theretofore?

A. I think not.

154 Q. Have no entries of indemnity lands been made during the past year in Oregon?

A. I stated that there might be a very few. My recollection is, there have been very few during the past year. It would not exceed 1,000 acres, perhaps.

Q. Have you now any in mind that you can name?

A. No, sir; I have not.

Q. Within the past three years, have any entries been permitted under the pre-emption or homestead laws by the United States, of lands constituting parts of odd-numbered sections within the primary or indemnity limits of the Oregon & California grant?

A. There have.

Q. To about what extent?

Mr. HALL: Same objection.

A. I should say 6,000 or 7,000 acres.

Q. Do you prepare the selection lists for submission to the Land Department of the United States, to procure the issue of patent for lands in the Oregon Central and Oregon & California grants?

A. Yes, sir.

Q. From what data do you prepare those lists?

A. From the tract books and adverse claims books, taken in conjunction.

Q. The books prepared by me, about which I have been testifying?

A. Yes, sir.

Q. Has your experience proved those books to be accurate or inaccurate?

A. Accurate.

Q. Accurate to a degree of excellency, or merely casually accurate?

A. Accurate to a degree of excellency, I should say. I found very few errors that have come under my observation. They amount to very little in number or point of acres.

155 Q. Were those errors in the nature of finding filings and entries in the land office not disclosed by my books, or were they in the nature of entries and filings reported on my books which did not exist?

A. In the nature of entries and filings that were not disclosed by the land-office records, and were, therefore, omitted from the tract books as made up by you.

Q. Speaking of errors found generally, is it not true that they consisted of filings and entries shown upon the Land Office books in Washington, which were not disclosed by the United States land office books in Oregon?

A. Yes, sir.

Cross-examination.

Mr. HALL:

Q. How did you arrive at the total number of acres in the primary grant which you have testified as being 3,815,838.80—that is, being the grant known as the Oregon & California grant?

A. I took the acreage from the tract books prepared under Mr. Singer's supervision, as far as lands were surveyed. There are a number of townships up there still unsurveyed, and as to the acreage of the unsurveyed townships or portions of townships, I estimated the acreage at the rate of 640 acres per section.

Q. That is, you estimated the entire area of all the odd sections within twenty miles on each side of the road-bed of said company?

A. Not all; only the unsurveyed sections were estimated. The others we had the actual acreage of.

Q. I mean, to determine the number of acres within the primary grant, you included all of the lands within the odd sections, within the limits of the primary grant?

156 A. Yes, sir; as shown upon the limit-line map, "Defendant's Exhibit No. 1," about which I testified.

Q. How did you arrive at the deficit within the odd-numbered sections or number of acres lost to the company within the primary limits of the Oregon & California grant?

A. From the records made by Mr. Singer, taking the lands first that were patented by the Government to others. Then taking lands that were in the wagon-road approved lists, lands adjudged mineral, lands finally disposed of by entries where they were not patented, and lands covered by homestead or pre-emption filings, or donation notifications, that were of record and uncanceled at the date of the company's grant, or at the date of the filing of map of definite location, and adding those together, they produce the result.

Q. Then you have proceeded upon the theory that the Oregon & California Railroad Company, and its successors in interest, were entitled to a number of acres equal in amount to the whole number of acres contained in odd sections within the primary limits?

A. Yes, sir.

Q. Whether the same had been disposed of by the Government prior to the time of the attaching of the Oregon & California Railroad Company's grant, or subsequent thereto?

A. Yes, sir.

Q. I will ask you whether or not, in arriving at the number of acres within the indemnity limits of the Oregon & California grant, that you pursued the same methods.

A. Yes, sir.

157 Q. And in arriving at the number of acres disposed of within the said indemnity limits, you have estimated and taken into account all lands that have been disposed of by the Government therein to wagon-road companies, to pre-emption and homestead settlers, and lands that had been adjudged mineral lands, and lands set apart for Indian reservations?

A. I have.

Q. Did you include in that report, as lands lost to the company, the lands here in controversy in cases Nos. 2,272, 2,273, 2,405 and 2,422?

A. I have not.

Q. I understand you to say you did not include the lands in forest reservations.

A. Not as lost in the primary limits, but as lost within the indemnity limits.

Q. And the same would be true so far as your method of computation is concerned with regard to the Oregon Central railroad grant?

A. Yes, sir.

Q. In each and every particular?

A. Yes, sir.

Q. I will ask you whether or not, in your figures, the lands disposed of by the United States, otherwise than to the Oregon & California Railroad Company, you have included the lands described in cases Nos. 2,405 and 2,422, circuit court of the United States for the district of Oregon?

A. No, sir, I have not included them as lost.

Q. How do you arrive at the number of acres in the unsurveyed tracts under each of these grants?

A. I know the lands that are unsurveyed, and estimated them at the rate of 640 acres per section.

Q. How do you determine the number of sections there
158 will be?

A. I have a list of the lands within the grant that are unsurveyed, that is gathered from the records of the surveyor general at Portland.

Q. What records do they have of such lands that are not surveyed? How do they describe them?

A. I hardly know how to answer that question, except that if the township is not surveyed at all, there is no plat of it, and in computing the acreage of the odd-numbered sections, I multiply 18 by 640. There are eighteen odd-numbered sections in a township. If any portion of a township remains unsurveyed, the United States plat in the surveyor general's office also shows that.

Q. Have all of the township lines been run within the indemnity limits of the said grants?

A. No, sir.

Q. Then, how do you determine how many townships that will be?

A. From projecting the lines of other townships surrounding the unsurveyed townships.

Q. How do you arrive at the distance?

A. From the map; by observation. I do not exactly understand how to answer that question, for the reason that I am not a surveyor.

Mr. SINGER: I will testify in regard to that.

Mr. HALL:

Q. Mr. Radcliffe, in computing the lands lost to the railroad company, or as lands disposed of by the Government, have you taken into account and deducted lands within the indemnity limits not

patented to the company, upon which settlers have filed either homestead or pre-emption?

A. If the filing has been allowed, and is still in force and uncanceled, I have treated the lands thereof as if lost—unless they were patented to the company.

159 Redirect examination.

Mr. SINGER:

Q. The filings just spoken of in the indemnity limits, which you treated as if lost; are they filings which have been made by volunteers, or been permitted by the General Land Office?

A. I do not understand what you mean exactly by "volunteers."

Q. Are filings by pre-emptioners or homesteaders permitted without notice to the company, a trial, or some decision by the General Land Office?

A. They are, I think, in a great many instances, in the indemnity limits.

F. C. RADCLIFFE.

WILLIAM SINGER, JR., recalled.

The WITNESS: I am familiar with the system of public surveys, and am sufficiently familiar with surveying to estimate areas, correct field-notes, and do office work in the surveyor general's office. The system of public surveys is deduced on a decimal scale from lines of latitude and longitude; that is, 60 miles make a degree, 6 miles make a township, and ten townships make a degree of latitude or longitude. Standard lines are established on half degrees, and corrections for the curvature of the earth in lines of longitude are corrected on the standard lines, and similar latitudinal corrections are made on meridian lines; hence, if township 1 south, 1 east, is surveyed, and township 4 south, 1 east, is unsurveyed, I know that, under the system of public surveys, township 2 south, 1
160 east, and 3 south, 1 east, unsurveyed, have intermediate existence—because, geographically, the earth's surface exists between the surveyed townships 1 south and 4 south. A section of land is one mile square, contains 640 acres, and there are 18 odd sections in a township; hence, the quantity granted in an unsurveyed township is, presumably, 18 times 640 acres. It is true the odd sections are said to be incapable of identification before survey—but the surface of the earth there, and so are the odd sections, the same before as after the survey.

WM. SINGER, JR.

Certificate of Examiner to Depositions.

I certify that the foregoing testimony was taken in pursuance of the stipulation prefixed hereto, on February 20th, 1899, at the office of Wm. Singer, Jr., rooms 61 and 62, Union Trust building, San Francisco, California in the presence of myself and the attorneys for the respective parties; that before giving his testimony each

of the witnesses whose testimony appears in the foregoing record was by me duly sworn to tell the truth, and nothing but the truth, in the foregoing-entitled causes; that such testimony was fully, truly and correctly taken in shorthand and transcribed by me, and thereafter each of the witnesses read and subscribed his own testimony as so taken and transcribed; and that I have retained the said testimony for delivery by my own hand to the court for which it was taken.

During the taking of the said testimony there were exhibited in evidence a certain map and books, marked by me as Defend-
161 ant's Exhibits Nos. 1 to 7, inclusive; also a certain paper marked by me as Defendant's Exhibit No. 8 which last-named exhibit accompanies record. The Exhibits Nos. 1 to 7, inclusive were withdrawn, by consent of the respective attorneys, after being marked by me for identification.

I further certify that I am not attorney nor counsel for either or any of the parties to the said causes, nor in anywise interested in the result thereof.

Dated, made, and signed by me on March 3d, 1899.

CLARENCE BENNETT,
Special Examiner.

DEFENDANT'S EXHIBIT No. 8.

(Clarence Bennett, special examiner.)

Status of the Oregon and California Grant.

Feb. 14, 1898.

Primary limits:

Total acres surveyed		3,379,527.68
Total acres unsurveyed, estimated		437,115.
Total area, primary grant		3,816,642.68

162 *Disposed of by the United States Otherwise Than to the O. & C. R. R. Co.*

To adverse claimants, approved to wagon-road Cos., and decided to be mineral	1,728,621.04
Within unsurveyed mining claims where segregation survey is required, the legal subdivisions amounting to	2,681.74
In mineral contests still undecided	1,069.12
Within limits of forest reservation not patented to company	7,478.63
Within limits of wagon-road grants, but not approved to the wagon-road companies	14,526.27

Within limits of wagon-road grants and United States forest reservation, still unsurveyed, estimated	13,240.	
Total disposed of		1,767,616.80
Remainder apparently clear to Co		2,049,025.88
Indemnity limits:		
Total acres surveyed	1,120,557.36	
Total acres, unsurveyed, estimated	663,830.	
Total area, indemnity grant		1,784,387.36

163 *Disposed of by the United States Otherwise Than to the O. & C. R. R. Co.*

To adverse claimants, approved to wagon-road Cos., in Indian reservation and decided mineral	261,447.44	
Within unsurveyed mining claims where segregation survey is required, the legal subdivisions amounting to	197.63	
Within limits of forest reservations, not patented to Co	34,607.23	
Within limits of wagon-road grants, but not approved to the wagon-road companies	16,805.90	
Within limits of wagon-road grants and forest reservations, unsurveyed, estimated	182,200.	
Total disposed of		495,258.20
Available to satisfy deficiency		1,289,129.16

164 *Summary.*

Total area in primary limits		3,816,642.68
Total acres clear to Co. in primary limits.	2,049,025.88	
Total acres clear to Co. in indemnity limits	1,289,129.16	
Total available for satisfaction of grant		3,338,155.04
Net deficiency		478,487.64

Depositions filed March 10, 1900.

J. A. SLADEN, *Clerk.*

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, J. A. Sladen, clerk of the circuit court of the United States, for the district of Oregon, in obedience to the foregoing order allowing appeal, do hereby certify that the foregoing pages, numbered from 3 to 163, inclusive, contain a full, true, and correct transcript of the record and proceedings had in said court, in cause No. 2,272, The United States, plaintiff, against The Oregon and California Railroad Company, defendant and appellant, as the same appear of record and on file in my office and custody.

165 And I further certify that the cost of the foregoing transcript is seventy-three and $\frac{40}{100}$ dollars, and that the same has been paid by the Oregon and California Railroad Company, appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, at Portland, in said district, this 30th day of August, 1900.

[SEAL.] J. A. SLADEN, *Clerk.*

(Endorsed:) No. 641. In the United States circuit court of appeals for the ninth circuit. The Oregon and California Railroad Company, appellant, *vs.* The United States, appellee. Transcript of record. Appealed from the circuit court of the United States for the district of Oregon. Filed September 1st, 1900. F. D. Monckton, clerk.

166 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant, *vs.* THE UNITED STATES, Appellee. } No. 641.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant, *vs.* THE UNITED STATES, Appellee. } No. 639.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant, *vs.* THE UNITED STATES, Appellee. } No. 640.

Appeals from the circuit court of the United States for the district of Oregon.

Before Ross and Morrow, circuit judges, and Hawley, district judge.

The COURT:

On the authority of Hewitt *v.* Schultz, Supreme Court Reporter, February 15, 1901, p. 309: Grinnell *v.* R. R. Co., 103 U. S. 739: St.

Paul etc. R. R. Co., *v.* Winona etc. R. R., 112 U. S. 720: Sioux City etc. R. R. *v.* Chicago, Milwaukee etc. R. R., 117 U. S. 406; U. S. *v.* Missouri, Kansas & Texas R. R., 141 U. S. 374, the judgment in each of the above-entitled cases is affirmed.

(Endorsed:) Opinion. Filed May 16, 1901, F. D. Monckton, clerk.

167 United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee.
} No. 641. Decree.

Appeal from the circuit court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Decree. Filed and entered May 16, 1901, F. D. Monckton, clerk.

168 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday the 9th day of October in the year of our Lord one thousand, nine hundred and one.

Present: Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee.
} No. 641.

Upon motion of William Singer, Jr., Esquire, counsel for the appellant, it is ordered that an appeal to the Supreme Court of the United States be and the same is hereby allowed; and that the amount of bond on appeal be and the same is hereby fixed in the sum of $300.

169 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant,
vs.
UNITED STATES, Complainant and Appellee.
} No. 641. In Equity.

Petition on Appeal.

The above-named defendant, conceiving itself aggrieved by the decree made and entered herein on May 16th 1901, appeals therefrom to the Supreme Court of the United States, for the reasons specified in its assignment of errors filed herewith; and the defendant prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner further prays, that upon giving a good and sufficient bond to be approved by this court, all proceedings in this cause, and upon the said decree, may be stayed pending its appeal.

WM. D. FENTON &
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

170 *Order Allowing Appeal.*

The foregoing claim of appeal, and prayer for supersedeas, are allowed and granted; the supersedeas to take effect upon the filing of a good and sufficient bond in the sum of five hundred dollars, conditioned that the appellant shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its appeal good.

It is further ordered that a transcript of the record, proceedings and papers upon which the said decree was made, under the seal of this court and the hand of its clerk, be sent to the Supreme Court of the United States.

San Francisco, October 15th, 1901.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Petition for appeal and order allowing appeal. Filed October 16, 1901, F. D. Monckton, clerk.

171 In the United States Circuit Court of Appeals, Ninth Circuit

OREGON & CALIFORNIA RAILROAD Company, Defendant and Appellant, vs. UNITED STATES, Complainant and Appellee.	No. 641.	In Equity.

Assignment of Errors.

The above-named defendant, by the undersigned, its attorneys and counsel, in connection with its petition for allowance of appeal herein, says that the decree in the above-entitled cause, made and entered on May 16th 1901, is erroneous and against its just rights in the following particulars; that is to say:

It is stipulated by counsel, and found in the decree, that none of the lands in suit are mineral lands, nor included by any exception or reservation from the indemnity grant made to the defendant by the act of July 25th 1866, except in so far as, if at all, they were excepted or reserved therefrom by reason of the several filings and settlement claims set forth in the bill and decree (20th item, decree); in other words, it is, in effect, agreed by the parties and found by the court, that the lands in suit were properly patented to the defendant unless the issue of such patent was rendered unlawful by those filings and settlement claims. In adjudging and decreeing the defendant's patent null, void, set aside and canceled, and
172 the lands thereof restored to the United States, the court erred as follows:

1st. Because the said act of July 25th 1866, granted *in præsenti*, and immediately transferred unto and conferred upon the defendant, a vested right to select the lands in suit in part satisfaction of the amount of land granted; and all of the said filings were made, and settlement initiated, subsequent to the said grant, subsequent to definite location of the defendant's railroad, and subsequent to the construction and acceptance of the defendant's railroad.

2nd. Because, as stipulated and found, defendant's map of survey and definite location was duly accepted and approved by the Secretary of the Interior on March 26th 1870. Thereupon, on that date, the lands in suit were, by the force and effect of the said act, reserved, set apart and withdrawn for the purposes of, and to satisfy, the defendant's grant, and have ever since so remained; hence none of said lands were public lands, nor subject to the said settlements or filings, at any of the times when such settlements or filings were made.

3rd. Because, as shown by defendant's undisputed evidence, all the odd sections, and parts of sections, within both primary and indemnity limits of the defendant's grant, not finally disposed of by the United States otherwise than to the defendant, are insufficient to make or equal the amount or quantity of land granted. Therefore all the lands in suit were granted to the defendant by force and

effect of the said act, without any selection thereof being required; hence none of the lands in suit were public lands, nor subject to the said settlements or filings, at any of the times when such settlements or filings were made.

4th. Because, as stipulated and found, the defendant selected the lands in suit in accordance with the instructions and direc-
173 tions of the Secretary of the Interior; and at all the times when such selections were filed and approved by the register and receiver of the United States Land Office, none of the said filings or entries had been tendered or made. Hence all the preemption and homestead filings set forth in the bill and decree were unlawfully permitted, and were null and void *ab initio*.

5th. Because, as stipulated and found, the defendant's map of definite location was accepted and approved by the Secretary of the Interior, of the lands in suit, was received at the proper local land office of the United States on April 25th 1870; hence none of the settlement claims set forth in the bill and decree are within the provisions of the act approved April 21st 1876, referred to in the said bill.

6th. Because, as stipulated and found, the defendant's railroad from Portland to Roseburg, through and beyond all the lands in suit, was fully constructed and equipped prior to December 4th 1872, and continuously after that date was operated for all the purposes contemplated by and provided for in the said granting act; and that portion thereof extending through and beyond all the lands in suit except the tract described in the "39th item" of the decree, was finally accepted by the United States prior to March 12th 1872. For these further reasons the said act approved April 21st 1876, is in nowise applicable to the settlement claims set forth in the bill and decree.

7th. Because, as stipulated and found, each homestead claim set forth in the bill and decree was filed during the year 1892; hence none of such homestead claimants can lawfully allege settlement prior to the act of Congress approved on May 14th 1880 (21 U. S. Stat. 141).

8th. Because, as shown by the facts stipulated and found, the United States has no such interest in the relief prayed for or given by the decree as will maintain this suit or sustain the decree.
174 *9th.* Because, as shown by the facts stipulated and found, the decree should have been for defendant as prayed, with costs.

Wherefore the defendant (appellant) prays that the said decree be reversed; and that the circuit court of the United States for the district of Oregon be directed to enter a decree dismissing the said suit.

WM. D. FENTON &
WM. SINGER, JR.,
Attorneys for the Appellant.

WM. F. HERRIN,
Counsel for the Appellant.

(Endorsed:) Assignment of errors. Filed October 16, 1901, F. D. Monckton, clerk.

175 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant, *vs.* UNITED STATES, Complainant and Appellee. } No. 641. In Equity.

Bond on Appeal.

We, N. T. Smith and J. H. Sharpe, both of the city and county of San Francisco, State of California, are held and firmly bound unto the United States of America, in the sum of five hundred (500) dollars, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The above-named defendant and appellant has been allowed an appeal to the Supreme Court of the United States, and a supersedeas, from the decree entered in the above-entitled court and cause on May 16th 1901; and the condition of this obligation is, that if the appellant shall prosecute its said appeal to effect, and answer all damages and costs if it fails to make its appeal good, then this obligation to be void; otherwise to remain in full force.

Dated, signed and sealed on October 15th 1901.

N. T. SMITH. [SEAL.]
J. H. SHARPE. [SEAL.]

176 Acknowledged before me on October 15th 1901.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, *City and County of San Francisco,* } *ss:*

N. T. Smith and J. H. Sharpe, being duly sworn, each for himself, deposes and says: I am a householder in the northern district of California, and am worth the sum of five hundred (500) dollars, exclusive of property exempt from execution, and over and above my just debts and liabilities, in property within said district.

N. T. SMITH.
J. H. SHARPE.

Subscribed and sworn to before me on October 15th 1901.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is approved.

WM. W. MORROW, *Judge.*

(Endorsed:) Bond on appeal. Filed October 16, 1901, F. D. Monckton, clerk.

177 United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee. } No. 641.

Certificate of Clerk of C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing 176 pages, numbered from one (1) to 176, inclusive, to be a true copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same together constitute the transcript upon appeal to the Supreme Court of the United States herein.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 28th day of October, A. D. 1901.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

178 UNITED STATES OF AMERICA, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on December 12th 1901, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Oregon & California Railroad Company are appellants and The United States of America is appellee, to show cause, if any there be, why the decree rendered on May 16th 1901, by the said United States circuit court of appeals against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city of San Francisco, on October 15th 1901.

WM. W. MORROW, *Judge.*

Due service by copy of the foregoing citation admitted on October 21st 1901.

JOHN H. HALL,
M.,
United States Attorney for Oregon, of Counsel for the Appellee.

179 [Endorsed:] No. 641. U. S. circuit court of appeals, ninth circuit. Oregon & Cal'a Railroad Co. *vs.* United States. Citation. Filed October 23rd 1901. F. D. Monckton, clerk. Wm. Singer, Jr., N. E. corner Second and Mission streets, San Francisco, Cal. att'y for —

Endorsed on cover: File No. 18,308. U. S. C. C. of appeals, 9th circuit. Term No. 186. The Oregon and California Railroad Company, appellant, *vs.* The United States. Filed November 8th, 1901.

FILE COPY.

Office Supreme Court, U. S.
FILED
FEB 25 1903
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 185.

OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

against

THE UNITED STATES,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN BEHALF OF THE APPELLANT.

MAXWELL EVARTS,
Of Counsel for the Appellant.

C. B. Stevens, Nassau and Cedar Streets, N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 186.

OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN BEHALF OF THE APPELLANT.

Statement.

By the first section of the Act of Congress, approved July 25, 1866, and entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon" (14 U. S. Stat., 239), a

railroad company to be thereafter organized under the laws of the State of Oregon, was authorized and empowered to construct and maintain a railroad and telegraph line within the State of Oregon, beginning at the City of Portland, Oregon, and running westerly through the Willamette, Umpqua and Rogue River Valleys to the southern boundary of the State, where it was to connect with the line authorized by the same Act of Congress to be built by the California and Oregon Railroad Company (Appendix, p. 1).

By Section 2 of said Act of Congress, a grant of land was given to the railroad company, to be thereafter organized under the laws of the State of Oregon, which prescribed primary limits ten alternate sections in width per mile on each side of the line adopted by the company, and indemnity limits extending ten miles beyond such primary limits.

Thereafter, and on April 22, 1867, the Oregon Central Railroad Company was incorporated under and by virtue of the laws of the State of Oregon, and on October 20, 1868, the Legislature of the State of Oregon, by joint resolution, duly designated the Oregon Central Railroad Com-

pany as the company entitled to receive the lands granted in Oregon, and the benefits and privileges conferred by said Act of Congress of July 25, 1866 (Record, p. 32).

The appellant in this case, the Oregon and California Railroad Company, was organized under the laws of the State of Oregon on March 7, 1870, and is the successor and assignee of the said Oregon Central Railroad Company, and is the owner of and entitled to all the benefits, privileges and grants in the State of Oregon offered and conferred by said Act of Congress of July 25, 1866 (Record, p. 34).

The map of definite location was filed on March 26, 1870 (Record, p. 36) and the line of railroad from Portland, Oregon, to Roseburg, Oregon, was constructed prior to December 4, 1872, and has since been continuously fully operated for all the purposes contemplated by and provided for in the said Act of Congress. (Record, p. 35).

The earliest acceptance by the President of the United States of this portion of the road was January 29, 1870, and the latest on March 11, 1872 (Record, p. 35). At that time the lands within the indemnity limits were insufficient to

make good the losses within the primary limits, and all the odd sections undisposed of within the primary and indemnity limits of the grant to the railroad did not come up to the quantity granted. Upon acceptance of the last section of this portion of the constructed road (March 11, 1872, if not before) it became the duty of the land officers of the United States under the requirements of Section 4 of the Act of 1866 (Appendix, p. III.) to immediately issue patents to the defendant for all the lands within the place and indemnity limits of the grant.

All of the lands involved in this suit and described in Paragraph II. of the bill of complaint herein are distant more than twenty miles from and lie within thirty miles on one side of the railroad extending from Jefferson to Roseburg, as shown on a map of definite location filed on March 26, 1870, and approved by the Secretary of the Interior on March 29, 1870 (Record, pp. 35, 36).

On August 16, 1892, the official plat of the survey of Township 27 South, Range 11 West, Willamette meridian, was filed in the United States Land Office at Roseburg, Oregon (Record, p. 36), and on the very same day the appellant the Oregon

and California Railroad Company filed with the Register and Receiver of the said Land Office at Roseburg its List No. 27, selecting the lands involved herein, and described in Paragraph II. of the bill of complaint, lying in Township 27 South, Range 11 West, as indemnity lands granted by said Act of Congress of July 25, 1866, in lieu of lands of equal area, lying within the primary limits of the grant under said Act of Congress, and otherwise disposed of by the United States prior to the passage thereof.

On October 19, 1892, the official plats of the survey of Townships 14 and 15 South, Range 8 West, Willamette meridian, were filed by the Government in the United States Land Office at Roseburg, Oregon, and on the same day the appellant the Oregon and California Railroad Company filed with the Register and Receiver of said Land Office at Roseburg its Lists No. 28 and No. 29, selecting the lands involved herein and described in Paragraph II. of the bill of complaint, lying in Townships 14 and 15 South, Range 8 West, as indemnity lands, granted by the Act of Congress of July 25, 1866, in lieu of lands of equal area, lying within the primary limits of said land grant, and otherwise

disposed of by the United States prior to the date thereof (Record, pp. 37, 38).

On October 25, 1892, more than two months after the appellant had filed its selection list of lands lying in Township 27 South, Range 11 West, one Charles Heller duly tendered the land office his filing for the benefit of all the heirs at law of one Louis Heller, as a homestead for all of the lands in Township 27 South, Range 11 West, Willamette meridian, involved in this suit (Record, p. 42), and on various dates from October 22, 1892, to December 9, 1892, other parties filed in the land office at Roseburg, in good faith, their applications to make homestead entry in their names under the homestead laws of the United States, of all the lands described in Paragraph II. of the bill of complaint and lying in Townships 14 and 15 South, Range 8 West, Willamette meridian (Record, pp. 38–41). All of these settlers, with the single exception of Louis Heller, entered upon the land long after the filing by the railroad of the map of definite location, and long after the railroad was completed and the company ready to make selection of its indemnity lands.

The selection lists filed by the Oregon and

California Railroad Company on August 16 and October 19, 1892, were presented to and approved by the Commissioner of the General Land Office, and the Secretary of the Interior, and thereafter on February 20, 1893, a patent was issued by the proper officers of the United States, conveying to the appellant the Oregon and California Railroad Company all of the lands described in the bill of complaint herein (Record, p. 42).

On October 27, 1893, the land grant under the Act of July 25, 1866, was unadjusted, and the Secretary of the Interior, regarding the patent for the land theretofore issued on February 20, 1893, to the Oregon and California Railroad Company to have been erroneously issued, directed the Commissioner of the General Land Office to demand a reconveyance of said land, as provided by statute. Such demand was thereafter duly made upon the railroad company by the Commissioner of the General Land Office for a reconveyance of said lands and the Oregon and California Railroad Company then refused and still refuses to make such conveyance (Record, p. 42).

Thereafter, and on January 31, 1896, under the authority given by the Act of Congress of March 3, 1887, entitled "An Act to Provide for the Ad-

justment of Land Grants Made by Congress to Aid in the Construction of Railroads, and for the Forfeiture of Unearned Lands, and for other Purposes," a bill was filed by the government in the United States Circuit Court for the District of Oregon seeking to set aside the patent granted to the appellant on February 20, 1893, upon the ground that it was erroneously issued (Record, p. 2).

Thereafter the case was tried before the Honorable CHARLES B. BELLINGER, United States District Judge for the District of Oregon, and on June 15, 1900, a final decree was entered therein, granting the prayer of the complaint, and directing that the patent theretofore issued by the United States to the appellant, the Oregon and California Railroad Company on February 20, 1893, be set aside, canceled and held to be null and void (Record, p. 52). From the final decree of June 15, 1900, an appeal was taken by the Oregon and California Railroad Company to the United States Circuit Court of Appeals, for the Ninth Circuit, which on May 16, 1901, affirmed the judgment below upon the authority of the case of Hewitt vs. Schultz, 180 U. S., 139 (Record, p. 87).

From the final decree of the said Circuit Court of Appeals, the present appeal to this Court has been taken (Record, p. 89).

Specification of Errors.

The Circuit Court of Appeals erred:

I. In not reversing the decree of the Circuit Court entered herein on June 15, 1900, and directing said Court to render a decree dismissing the bill of the United States.

II. In deciding that the United States was entitled to a decree vacating and setting aside the patent to the lands in controversy issued to the Oregon and California Railroad Company February 20, 1893.

III. In not deciding that the appellant the Oregon and California Railroad Company was entitled to make the selection of the lands in controversy and to receive a patent therefor, upon the ground that the status of such lands, at the time of their selection, determined the right of the railroad thereto, and that at such time, the title of said land was in the United States, and that it was then open to selection under the grant of July 25, 1866.

IV. In not deciding that the various parties

who had come upon the land prior to the selection thereof by the appellant were mere occupants and had no claim of any kind thereto.

V. In not deciding that the relative rights of the railroad company and the individual claimants were to be determined in favor of the former for the reason that it had first filed in the local land office the record evidence of its claim to the land in controversy.

DECISION IN THE CASE OF HEWITT VS. SCHULTZ.

The Court below dismissed this suit without any opinion upon the ground that it was controlled by the case of Hewitt vs. Schultz, 180 U. S., 139. It is probable that the Government will now claim that its position in this case has been strengthened by the subsequent decisions of the Southern Pacific Railroad Co. vs. Bell, 183 U. S., 675, and of Groeck vs. Southern Pacific Railroad Co., 183 U. S., 690, which last two cases somewhat extended the doctrine of the Hewitt case.

It therefore becomes necessary to carefully examine these cases and see just what it was which was there decided. The Hewitt case was an action of ejectment, in which the plaintiff claimed

to be the owner in fee of the land by virtue of a patent issued to him by the United States. The defendants claimed title as purchasers from the Northern Pacific Railroad Company, which asserted ownership in the land by virtue of its grant under the Act of Congress of July 2, 1864. The land there in controversy was situated within the indemnity limits of the grant to the railroad company in a territory, and it appeared that Hewitt, after the plat of survey was filed, duly presented within the proper time, and on the 2d day of November, 1882, to the local land office, a declaratory statement for the land in question as required by law. On March 19, 1883, the railroad company filed in the land office a selection list embracing the land in dispute. It was held by this Court that the plaintiff Hewitt was entitled to succeed in the action of ejectment upon the ground that the land within the indemnity limits of the grant to the Northern Pacific Railroad Company was open to settlement and preemption at any time prior to its selection by the railroad company to make good losses within its indemnity limits, and that, as Hewitt had first obtained record evidence of his claim, he should have the land. Substantially the only

question considered by the Court was whether indemnity lands of a railroad grant were reserved from public settlement and not the relative rights to such lands as between a railroad company and a mere occupant. In other words, all that was decided by the Hewitt case was that the plaintiff, when he filed his declaratory statement in the local land office under the land law, acquired a right to the land because he had filed the record evidence of his claim before the railroad company filed its selection lists. The Hewitt case is the reverse of the case at bar. Here the selection by the Company is prior to the filing of the declaratory statement by the would-be settler. The Bell and Groeck cases simply held that a patent issued to a settler under the land laws prior to the selection of the land in dispute by a railroad company was valid, the Court saying in the Bell case at page 690: "We are therefore of opinion * * * that such lands [indemnity lands] remained open to homestead and preëmption entry, and that patents issued to settlers within such indemnity limits, *based upon the entries made prior to the selection by the railroad company*, approved by the Interior Department, were valid." * * * In all three

of these cases, the act of the settler in obtaining a patent, or filing a declaratory statement as required by the land law, *was prior to the selection of the lands by the railroad company.* In the present case, the selection of the lands by the railroad company is *prior to the filing of the declaratory statement by the settlers.* Not a single word in the opinions of this Court in any one of these three cases touches upon or even suggests the important questions involved in the case at bar. It is therefore difficult to see how they can have any bearing upon the present controversy. They certainly cannot be said to control the questions now before the court.

ARGUMENT.

FIRST POINT.

The appellant on August 16 and October 19, 1892, was entitled to select the land in controversy and to receive a patent therefor.

The lands involved upon this appeal are within the indemnity limits of the grant to the railroad company under the Act of July 25, 1866. The

map of definite location was filed by the appellant March 26, 1870 (Record, p. 36). The line of the railroad from Portland to Roseburg was completed and in full operation in 1872 (Record, p. 35). The losses within the place limits of the grant were then known. The entire tract within the indemnity limits was insufficient to make good the losses within the primary limits (Record, p. 23). The indemnity limits fell short some 478,487 acres of supplying the losses within the primary limits (Record, p. 86). In 1872 the railroad was ready to file its indemnity selection lists. The United States had then failed to file an official survey of the land and did not do so until twenty years thereafter. Under the rulings of the Interior Department the railroad was not permitted to present its selection lists until the official survey had been filed in the local land office, and upon the very day such official survey was filed, the railroad company, after being compelled by the United States to wait twenty years, filed its selection lists covering the land in controversy.

The single but important question presented in this case is whether the railroad lost its right to make the selection when it did, because, before

such selection and subsequent to the time when the company was ready to make its selection, but was prevented by the government's delay in filing its official survey, the land was occupied and nothing more by various individuals. In other words the question comes to this: What was the status of the lands when selected by the railroad company? Were they then public lands of the United States, and was the railroad prevented from making a selection thereof by reason of their mere occupancy?

It is well established law that the mere occupancy of public land creates no right therein as against the United States, and that the land still remains part of the public domain and subject to disposal by the government.

In the Yosemite Valley Case, 15 Wall., 77, it was so held, Mr. Justice FIELD stating the rule, as follows:

> "A party by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party." (Syllabus).

In the case of Lansdale vs. Daniels, 100 U. S., 113, 116, it was said:

> "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose."

In the case of Sparks vs. Pierce, 115 U. S., 408, 412, it was said by Mr. Justice FIELD as follows:

> "The case presented, therefore, is that of occupants of the public lands without title, and without any attempt having been made by them, or by any one representing them, to secure that title, resisting the enforcement of the patent of the United States, on the ground of such occupation. *Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them.*"

The right of a railroad company to select lands within the indemnity limits of its grant to make good losses within the primary limits is an inchoate right created by the granting act, and capable of perfection only by the selection of the indemnity lands. At the moment of selection

the right is perfected. Such selection cannot, however, be made until the official plat of the survey is filed by the government in the land office.

The right acquired by an occupant of the public lands of the United States is merely an inchoate right to be perfected by filing the declaratory statement or homestead entry and carrying out the further provisions of the land laws. The utmost which this inchoate right gives to the occupant is simply a preference as against other individuals who have not an equal or prior equity in and to the land so occupied, so that as between individuals the question is which one first occupied the land. This rule has no application where the claimants to land are a railroad under its land grant and an individual. In such a case their relative rights are determined, and determined only, by the question of which one first filed record evidence of a claim (Tarpey vs. Madsen, 178 U. S., 215). This inchoate right of the individual cannot be perfected until after the filing in the proper land office of the official plat of the survey of the land.

When, therefore, the official plat of the survey of the land in controversy was filed, all that

either the railroad or the individuals had was an inchoate right to the land in dispute and the opportunity for the first time to perfect such right. In the case of the railroad company its inchoate right was acquired (except in one instance) many years prior to the creation of any inchoate right in the occupants of these lands.

Thereupon and on the very day the official survey was filed, the railroad company filed its selection lists and perfected its inchoate right to the land. At the time of its selection by the railroad the land was under the decisions heretofore cited public land of the United States and subject to its disposal. The ordinary rule is that the right of a railroad to select indemnity lands is determined by the status of the lands at the time of selection unaffected by their past history and certainly (it is confidently submitted) unaffected by what claims thereto may be made in the future. It would seem, therefore, that the question presented is whether the ordinary and well-established rule regarding the selection of indemnity lands shall prevail, or whether the land in question, while remaining at the time of selection part of the public domain, so far as the government is concerned, is to be considered

as withdrawn from the public domain as regards the railroad, because of its mere occupancy by an individual without the filing in the land office of any record evidence of his claim. In short, is the land in dispute to be considered public land for one purpose and not for another?

We now come to the consideration of the decisions of this court holding that the fact and date of occupancy are unimportant in determining conflicting claims of an individual and a railroad company to lands within a railroad grant. The latest and most important of these is Tarpey vs. Madsen, 178 U. S., 215.

In the Tarpey case it was held that the relative rights of a railroad and an individual must be determined, not by the act of the company in fixing definitely the line of its road and not by the mere occupancy of the individual, but by the record evidence in the case; on the one hand, by the filing of the map of definite location in the office of the Secretary of the Interior, and on the other, by the filing of the declaration of entry of the individual in the local land office. The land involved in the Tarpey case was within the place limits of the grant to the railroad com-

pany. If the claims as between the railroad and the occupant were there determined by ascertaining which first filed record evidence of its right, it would seem as if the same rule must have application in the present suit when the land is within the indemnity limits. The only difference is that the right and title of a railroad to land within the place limits of its grant is determined by the filing of a map of definite location, while the right and title to the land within the indemnity limits of a grant to a railroad company is determined by the filing in the land office of its selection lists. If, in the first case, the occupant has no claim to the land, because the map of definite location was filed by the railroad in the land office before the occupant filed his declaration of entry, then it would seem to follow that the occupant has no right to land lying within the indemnity limits of the grant to the railroad company, if, prior to the filing by him of his declaration in the local land office, the railroad company had filed its selection list covering the land. The right and title of the railroad to the land was determined in the Tarpey case by filing the map of definite location. In the present case, by filing the selection lists, and it is

not easy to perceive what principle or distinction can be drawn between the two cases.

In the course of his opinion in the Tarpey case, Mr. Justice BREWER said, at page 222:

> "Any controversy between two occupants of a tract open to preëmption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy, and these controversies are of frequent cognizance. Oral evidence, therefore, of the date of occupancy may be decisive of the controversy between such individual applicants for a tract of public land, *but by decisions of this court, running back to 1882, as between a railroad company holding a land grant and an individual entryman the question of right has been declared to rest not on the mere matter of occupancy, but upon the state of the record.*"

And again at page 228, it was said:

> "Recapitulating, we are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the

> company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration or entry in the local land office."

In the case of Northern Pacific Railroad vs. Colburn, 164 U.S., 383, the railroad company filed its map of definite location July 6, 1882. At that time the land in dispute which was within the place limits of the grant was occupied and cultivated by a settler, but no filing or entry therefor had been made in the land office. The State Court of Montana decided that the mere occupancy of the land, prior to the filing by the railroad of its map of definite location, excepted the land from the scope of the company's grant. This Court upon writ of error reversed the judgment below and Mr. Justice BREWER, at page 386, said:

> "It is true it is also disclosed by the answer that one Kelly was in occupation, or at least cultivating the land at the time of the filing of the map of definite location, and the decision of the land department as to that fact undoubtedly concludes both parties.

> And if it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the Supreme Court of Montana was right. *But frequent decisions of this court have been to the effect that no preëmption or homestead claim attaches to a tract until an entry in the local land office.*"

In Whitney vs. Taylor, 158 U. S., 85, this Court said, at page 94:

> "But it is also true that settlement alone without a declaratory statement creates no preëmption right. * * * *And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the preëmption claim.*"

In Buxton vs. Traver, 130 U. S., 232, it was held that:

> "A settler upon public land, in advance of the public surveys, acquires no estate in the land which he can devise by will, or

which, in case of his death intestate, will pass to his heirs at law, until, within the specified time after the surveys and the return of the township plat, he files a declaratory statement such as is required when the surveys have preceded settlement, and performs the other acts prescribed by law" (Head note).

As we read the foregoing cases they would seem to control the case at bar and to place beyond controversy the proposition that the individual occupants of the lands in question acquired no rights thereto by their mere occupancy as against the record claim of the railroad company evidenced by the filing of its selection lists. Counsel for the goverment, however, may contend that the cases cited have no application in the present suit for the reason that the land there involved fell within the place limits of the railroad grant, while here the lands are within the indemnity limits. It is true that this distinction can be drawn between the cases cited and the case at bar, but the force of the distinction is not obvious.

If it is conceded that the title of a railroad to its place lands under a government grant is deter-

mined by the filing of its map of definite location and that the unascertained and floating right to its indemnity lands becomes fixed by filing in the land office its selection lists (we assume that this will be conceded by counsel for the government), and if the occupancy of an individual prior to the acquisition by a railroad of title to its place lands by the filing in the land office of its map of definite location does not withdraw the land from the operation of the railroad grant or affect in any way the claim of the railroad, then it is certainly not clear why such occupancy prior to the acquisition by a railroad of title to its indemnity lands by the filing of its selection lists in the land office should have a different effect and should withdraw the land from the operation of the railroad grant, especially when the acreage of such indemnity lands is insufficient to make good the losses within the primary limits. It would seem as if the result of the occupancy must be the same in each case. If in the case of place lands, prior occupancy is unimportant in determining the relative rights of railroad and individual, and the conflicting claims are settled by the record evidence in the land office and by that alone, it is

not at all plain why the same reasoning should not result in applying the same rule as between the conflicting claims of a railroad and of an individual to land within the indemnity limits of a government grant.

When it is borne in mind that in the case at bar the inchoate right of the railroad was prior in point of time to the inchoate right of the occupant, and that such inchoate right of the railroad was perfected prior to any attempt to perfect the right of the occupant, and when it is further considered that all the lands within the indemnity limits are not sufficient to make good the losses within the primary limits, and that if it had not been for the delay of the government in making a survey of the land, the inchoate right of the railroad would have been perfected prior even to the inception of the inchoate right of the occupant, it is difficult to see upon what principle the Courts below have decided that the railroad company was not entitled to the patent which it had obtained from the government for the land in question.

It certainly could never have been intended by Congress that this grant of indemnity limits to the railroad company should be defeated—first,

by delay on the part of the government in completing a survey of the lands; and, second, by permitting any mere occupant to insist that, by reason of such occupancy alone, the railroad had lost the opportunity to perfect the right given to it long prior to the commencement of such occupancy. It certainly never occurred to this Court in the case of Hewitt vs. Schultz, or the subsequent cases of Bell and Groeck, that the doctrine there decided called for a decree annulling the patents granted by the government in the present case. On the contrary, these cases were decided upon the very ground which it is sought to apply in the suit at bar, viz: that the declaratory statement and the patents of the individuals were prior in point of time to the selection of the lands by the railroad company, or to put it in another way, that the individuals obtained record evidence of their claim before the railroad did. These cases simply emphasize and repeat the principle of Tarpey vs. Madsen (*supra*), and apply to indemnity lands, the doctrine that the relative rights of a railroad and an individual should be determined by the record evidence, and that if the occupant had filed his declaration in

the local land office prior to the filing by the railroad of its selection list, then his right was superior to that of the railroad. In the case at bar, however, it was the railroad which first filed its selection list, thus first perfecting an inchoate right first obtained, and not only under the doctrine of Tarpey vs. Madsen, but under the ordinary principles of equity the right of the railroad to the patent for this land being first in point of time, whether as to its record title or as to its original inception, should be held to be superior to the right thereto of the individual occupants. In other words, the maxim should apply "*qui prior est in tempore potior est in jure.*"

In the case of Shepley vs. Cowan, 91 U. S., 330, the plaintiffs asserted title to the premises in question under a patent issued by the Governor of the State of Missouri, on February 27, 1850, purporting to be for lands selected under the Eighth Section of the Act of Congress of September 4, 1841. The defendants claimed title to the premises under a patent of the United States, dated July 21, 1866, issued to the heirs of Thomas Chartrand upon an alleged pre-emption right acquired by a settlement of their ancestor. It appeared that Chartrand, the ancestor of the

defendants, settled upon the land in 1835 and made application to prove his settlement and entered the land under the laws then existing. The local land officers declined to receive his proofs upon the ground that the land was then reserved. This was a mistake. The State of Missouri from which the plaintiffs obtained their title selected the land subsequently in 1849. The plaintiffs were successful in the Court below, but upon appeal to this Court, the case was reversed upon the ground that the right in the ancestor of the defendants was first in point of time, and that the first initiatory step was taken by such ancestor to perfect that right, and it was held by the Court, that

> "Where a State seeks to select lands as a part of the grant to it by the eighth section of the act of Congress of Sept. 4, 1841, and a settler seeks to acquire a right of pre-emption to the same lands, *the party taking the first initiatory step, if the same is followed up to patent, acquires the better right to the premises. The patent relates back to the date of the initiatory act, and cuts off all intervening claimants.*
>
> "The eighth section of the act of Sept. 4, 1841, in authorizing the State to make

selections of land, does not interfere with the operation of the other provisions of that act regulating the system of settlement and preemption. The two modes of acquiring title to land from the United States are not in conflict with each other. *Both are to have full operation, that one controlling in a particular case under which the first initiatory step was had.*

"Whilst, according to previous decisions of this court, no vested right in the public lands as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. *In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.*"

In the case of United States vs. Missouri, &c., Railway, 141 U. S., 358, Mr. Justice HARLAN in writing the opinion of the court seems to acquiesce in the view that as between an occupant of the public lands and a railroad claiming indem-

nity lands under a grant from the government that one is to be preferred who first obtains record evidence of his claim, for it is said, at page 376:

> "In respect, therefore, of even numbered sections within the indemnity limits of the Leavenworth road, preëmption and homestead rights may have legally attached before their final selection as indemnity lands for the Missouri-Kansas Company. And rights thus attaching would not be displaced by subsequent selection, and by issuing patents to the railroad company."

When Mr. Justice HARLAN spoke of the settler's "rights thus attached," he meant, of course, attached by the commencement of some proceeding in the proper land office. Such was the meaning given to the word by Mr. Justice MILLER in Kansas-Pacific Railway Company vs. Dunmeyer, 113 U. S., 629, when he said, at page 644:

> "Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate

right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds."

In other words, this Court, in the Missouri Railway Case virtually held that the settlers were entitled to their land in preference to the railway company under its grant, because record evidence of their claim was first filed in the land office and the logical deduction from this conclusion is, that if the railway company had first recorded the evidence of its claim by filing its selection list in the land office, it would have acquired a right to the land to be preferred to the claim of the mere occupant thereof. That is to say, this decision is but in accord with the accepted doctrine of this Court as last declared in the Tarpey Case, to the effect that, while the rights of individual claimants are to be determined by the question of which first occupied the land, yet, as between

a railroad and an individual, their relative rights are to be decided and decided only by the fact of which one took the first initiatory step and filed record evidence in the land office of a claim to the land.

The relative rights of two railroads claiming the same land, within the indemity limits of their respective grants, are determined by which has first acquired the record evidence of its claim. As was said by Mr. Justice MILLER in St. Paul Railroad vs. Winona Railroad, 112 U. S., 720, 732:

> "Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land. *In this case, and for these reasons, priority of selection secures priority of right.*"

We restate the important facts in this case as follows:

FIRST. That the railroad filed its map of definite location March 26, 1902, and that its

line of road from Portland to Roseburg was completed and in full operation in 1872, and the company then ready to select its indemnity lands, but was unable to do so until 1892 because of the delay of the government in filing its official survey.

SECOND. That the land in dispute (with the exception of one tract) was not occupied by settlers until long after 1872, when the railroad was ready to make selection thereof, but was prevented by the failure of the United States to file its official survey.

THIRD. That all the lands within the indemnity limits of the grant to the appellant were insufficient to make good the losses within the place limits.

FOURTH. That at the time the railroad filed its selection lists the land was public land of the United States unaffected by any record claims thereto of any individual.

We also restate the important principles established by the decisions of this Court, as follows:

FIRST. That the status of land at the time of its selection determines the right of the railroad thereto.

SECOND. That the relative rights of a rail-

road and an individual to lands within the indemnity limits of a railroad land grant are determined by ascertaining which took the first initiatory step and filed in the land office record evidence of a claim thereto.

We respectfully submit that the application of the well-settled principles of land-grant law stated in the two preceding paragraphs to the facts in this case gives to the railroad a clear equitable right to the lands in dispute and to the patents of the government issued therefor.

SECOND POINT.

The indemnity lands were appropriated to the grant under the act of 1866 at the time the map of definite location was filed in March, 1870, and the road was built and accepted in 1872 and selection was not necessary in order to fix and determine the rights of the railroad thereto.

By the fifth section of the act of 1866 (Appendix, p. IV), it is provided that the appellant,

> " shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops

of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States."

The land grant to the railroad was made in consideration of this provision and the government virtually agreed that, if the railroad would build its line of road through an uninhabited country, and would carry the property and troops of the United States free of charge for all time to come, it would grant to it ten alternate sections of land for each mile of its road.

On March 11, 1872, the time of the acceptance by the President of the United States of the last section of the portion of the road running through the lands in dispute, the lands within the indemnity limits of the grant were insufficient to make good the losses within the place limits, and all the land, both in the indemnity and place limits, was not equal to the amount of ten sections per mile offered by the government in return for the building of the road and the carrying of the property and troops of the United States free of charge.

The position of the appellant, therefore, is that the railroad was entitled on March 11, 1872, to patents for all the lands along that part of its road which had been accepted and was then being operated whether the same were within the indemnity limits or the place limits of the grant, and its right to the indemnity lands was determined and fixed under the circumstances of this particular case, and the provisions of the act of July 25, 1866, by the filing of its map of definite location and the acceptance of its road by the government, and did not require any selection by it of its indemnity lands.

There was no need or necessity or opportunity to make selection for the reason that the railroad was entitled to all of its indemnity lands, and the railroad would not be required to do what would be vain and unnecessary. That indemnity lands are appropriated to the grant without selection, when they are insufficient to supply the deficiencies in the place limits, was held by this Court in St. Paul & Pacific vs. Northern Pacific, 139 U. S. 1, 19, where it was said:

> "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to

> make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, *for they were all appropriated.*"

Even if selection of its indemnity land had been necessary, the railroad was ready to make such selection at the time of the filing of its map of definite location long before the land was occupied by settlers, but was not permitted by the government to make such selection until the government filed its survey of the land. The failure to select the indemnity land in 1872, was not the fault of the railroad, but the fault of the United States, which now seeks to set aside the patent. Surely a complainant in a suit in equity cannot avail itself of its own neglect and laches to defeat the just rights of its own grantee.

We, therefore, respectfully submit that in 1872 at the latest, when the railroad was accepted by the government, its indemnity lands were appropriated to the grant, and the railroad then became

immediately entitled to a patent therefor under the provisions of Section 4 of the Act of 1866 (Appendix, p. iv), and the right of the railroad to said lands could not be affected by any subsequent occupancy of the lands by settlers.

THIRD POINT.

The United States cannot maintain the present suit.

The patent in this case was not obtained by fraud. The government therefore has no interest in the matter and cannot bring a suit in equity to cancel the patent, but must leave the parties interested, viz., the railroad company and the settlers, who claim that they are equitably entitled to the land in question, to settle the matter between themselves. In the case of United States vs. Beebe, 127 U. S. 338, in which this question was discussed, it was said at page 342 as follows:

> "If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested."

In the case of United States vs. San Jacinto Tin Co., 125 U. S. 273, it was held as follows:

> "When it is apparent that the only purpose of bringing the suit is to benefit one of two claimants to the land, and the government has no interest in the matter, the suit must fail" (Headnote).

As it seems to us the only question in the present case is between the railroad and individuals which should be settled in a litigation between themselves and that the government has no interest in the matter. We, therefore, respectfully submit that the bill should be dismissed upon the ground that the United States cannot bring suit to cancel this patent for the reason that the outcome of the suit would simply be to benefit one of two claimants to the land and would not subserve any interest of the government.

FOURTH POINT.

The judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

MAXWELL EVARTS,
Of Counsel for Appellant.

APPENDIX.

ACT OF CONGRESS APPROVED JULY 25, 1866 (14 U. S. STAT., 239).

AN ACT Granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the "California and Oregon Railroad Company," organized under an act of the State of California, to protect certain parties in and to a railroad survey, "to connect Portland, in Oregon, with Marysville, in California," approved April sixth, eighteen hundred and sixty-three, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to-wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento Valley, in the State of California, and running thence Northerly, through the Sacramento and Shasta Valleys, to the Northern boundary of the State of California; and the said Oregon company to construct that part of the said railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River Valleys to the Southern boundary of Oregon, where the same shall connect with the part aforesaid, to be made by the first named company: *Provided*, That the

company completing its respective part of the said railroad and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right, and the said company is hereby authorized, to continue in constructing the same beyond the line aforesaid, with the consent of the State in which the unfinished part may lie, upon the terms mentioned in this act, until the said parts shall meet and connect, and the whole line of said railroad and telegraph shall be completed.

SEC. 2. *And be* [*it*] *further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States,

respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That bona fide and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided, also*, That, settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said companies for the construction of said railroad and telegraph line; and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side-tracks, turntables, water stations, or any other structures required in the construction and operating of said road.

SEC. 4. *And be it further enacted*, That whenever the said companies, or either of them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, the President of the United States shall appoint three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that

twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissoners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of said railroad and telegraph line as aforesaid; and from time to time whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued.

SEC. 5. *And be it further enacted*, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

SEC. 6. *And be it further enacted*, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of

said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith.

SEC. 7. *And be it further enacted*, That the said companies named in this act are hereby required to operate and use the portion or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any State, of competent jurisdiction.

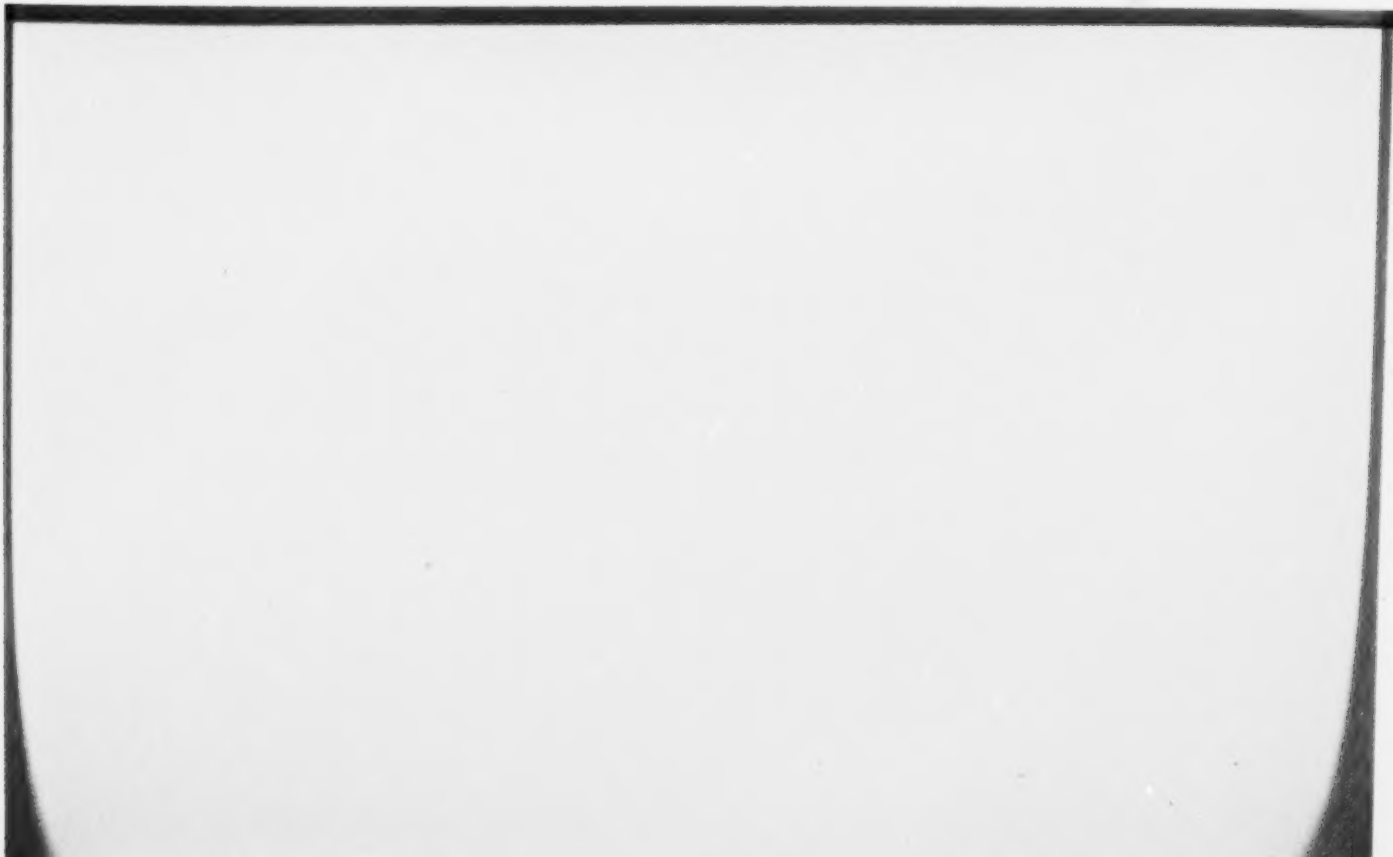
SEC. 8. *And be it further enacted*, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

SEC. 9. *And be it further enacted*, That the said "California and Oregon Railroad Company" and the said "Oregon Company" shall be governed by the provisions of the general railroad and telegraph laws of their respective States, as to the construction and management of the said railroad and telegraph line hereinbefore authorized, in all matters not provided for in this act. Whereever the word "company" or "companies" is used in this act it shall be construed to embrace the words "their associates, successors, and assigns," the same as if the words had been inserted, or thereto annexed.

SEC. 10. *And be it further enacted*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, so much of the timber thereon as shall be required to construct said road over such mineral land is hereby granted to said companies: *Provided*, That the term "mineral lands" shall not include lands containing coal and iron.

SEC. 11. *And be it further enacted*, That the said companies named in this act shall obtain the consent of the legislatures of their respective states, and be governed by the statutory regulations thereof in all matters pertaining to the right of way, wherever the said road and telegraph line shall not pass over or through the public lands of the United States.

SEC. 12. *And be it further enacted*, That Congress may at any time, having due regard for the rights of said California and Oregon railroad companies, add to, alter, amend, or repeal this act.



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 186.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF OF APPELLANT.

The grant to the railroad was in 1866. The initiatory step taken by the appellant to obtain its indemnity lands was the filing of its map of definite location in March, 1870, when its grant took effect as to place land and its right to select indemnity land accrued. The exercise of this right

of selection was then denied to the appellant by the complainant in this suit upon the ground that the lands were unsurveyed. If upon the filing the map of definite location in 1870, and the completion of the road in 1872, the government had performed its obligation to the railroad and surveyed the land promptly, this case would not have arisen, as the appellant would have selected the land long prior to its occupancy by the settlers in this case.

The inchoate right of the railroad to indemnity land created by the Act of 1866, and made a fixed and certain inchoate right by the filing of the map of definite location in 1870, was perfected by the filing of selection lists in 1892, prior to any claim to the land being entered in the land office by the occupants thereon.

The question presented is whether the railroad, which took its first step to acquire its indemnity land long before the occupancy by the settlers and was prevented by the government from taking its final step also before such occupancy, but did take such final action prior to any final action on the part of the settlers, is entitled to the land, or whether the claimant with the junior inchoate right and the last perfected

right should take it. If the two claimants in this case were both individuals, the one represented by the appellant would unquestionably be given the land. If the two claimants were both railroads, the land would be awarded to the appellant. The decision would be placed upon the old maxim of first in time, first in right, and as the appellant took the first proceeding for the acquisition of its title by filing its map of definite location in 1870 (long before the other claimant had gone on the land) and had first taken the final step to perfect that title, it would have been given the land.

The controversy then comes to this: Is a different rule to prevail in the case at bar because one of the claimants is a railroad and the other a settler, and if so, why? In other words, is the broad principal of equity and the doctrine of Shepley vs. Cowan, 91 U. S., 330, to be disregarded because a railroad is a party to this suit and is the court prepared to depart from the wise and just rule laid down in Tarpey vs. Madsen, 178 U. S., 215; Northern Pacific vs. Colburn, 164 U. S., 383; Whitney vs. Taylor, 158 U. S., 85, and Buxton vs. Traver, 130 U. S., 232 (relates to unsurveyed lands), that the rela-

tive rights as between a railroad and an individual are determined by ascertaining which one first filed record evidence of its claim in the land office.

The government insists that a different rule should govern this case than would be invoked if both claimants were individuals or both claimants were railroads, because of the recent decision in Nelson vs. The Northern Pacific Railway Company, and it therefore becomes necessary to examine this case and see what bearing (if any) it has upon the case at bar.

The question decided in the Nelson case was that an occupant who settled upon unsurveyed public land *before* the filing by the railroad of a map of definite location was entitled to the land.

In the present case the occupant settled upon the land *long after* the filing of the map of definite location.

It is true that in one case the land was place land and in the other indemnity, but the filing of the map of definite location is as necessary a step in the acquisition of title to indemnity land as it is in the case of place land.

In the Nelson case the delay of twenty years (from 1864 to 1884) in filing the map of definite

location which enabled the occupant to make his settlement was a delay on the part of the railroad company for which it alone was responsible.

In the case at bar the delay in filing the selection list which gave the occupant his opportunity to settle was not that of the railroad, but of the government the complainant in this suit.

In the Nelson case the railroad was not required to carry the troops and supplies for the United States free of charge so long as the nation existed. In the present case it is and its grantor (complainant in this suit) after driving such a shrewd bargain should under the ordinary principles of equity be astute to see that its grantee receives the full consideration for the contract, instead of ever striving to take from it the little which it has succeeded in obtaining.

In the case at bar the question is to which of two claimants shall be given a tract of land, the title to which they are both permitted to perfect after a certain given point of time. Shall it be given to the one who first takes the necessary proceeding, when he also had the first inchoate right and took the first initiatory step to perfect that right, or shall it be given to the other?

The record and opinion in the Nelson case can

be searched from one end to the other and no such question will be found, and we therefore say that for the many reasons we have given, the Nelson case in no way controls the present controversy, which must stand or fall upon its own merits.

The government gave to the railroad the right to select its indemnity land upon the filing of the surveys in the land office, just as much as it gave the occupant the right to make his entry at the same point of time. The right was first given to the railroad. Now the government having given the same right under different systems of law to two people, if the rule that the person first exercising that right is not entitled to the land, we respectfully ask what rule is to determine the rights between them.

MAXWELL EVARTS,
Of Counsel for Appellant.

APPENDIX.

Letter to the Secretary of the Interior from the Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

WASHINGTON, D. C., March 3, 1903.

I, W. A. RICHARDS, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter of June 29, 1900, addressed to the Secretary of the Interior, is a true and literal exemplification from the record of said letter in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

[SEAL. UNITED STATES GENERAL LAND OFFICE.]

(Signed) W. A. RICHARDS,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., June 29, 1900.

The Honorable

The Secretary of the Interior:

SIR.—In accordance with the directions of the Department (6 L. D. 276) and the requirements of the act of March 3, 1887 (24 Stat., 556) an examination with a view to its adjustment has been made of the grant to the Oregon and California Railroad Company in the State of Oregon by act of July 25, 1866 (14 Stat., 239), and I hand you herewith a statement of the results of such examination for your information and such instructions or suggestions as you may deem proper.

The examination shows the whole area of the grant in the primary (20 miles) limits to be 3,821,901.80 acres, of which amount there are chargeable against the grant 2,128,979.36 acres, thus leaving an apparent loss in said limits of 1,692,922.44 acres, 215,914.10 acres of which are lost by reason of falling within conflicting limits of prior grants and the remainder by entries, filings, etc.

The area of the indemnity (30 miles) limits is shown to be 1,779,352.10 acres, of which 472,197.49 acres have been otherwise disposed of, leaving available in this limit (at the time of the examination), for the purpose of satisfying the grant, 1,307,154.61 or 385,767.83 acres less than the required amount, even in the improbable event of the company obtaining title to all the lands shown at the time of the examination to have been available for the grant.

In connection with the deficiency in the grant above reported, however, attention is called to the fact that there have been erroneously patented to the company 6,963.33 acres outside the limits of its grant and 1,576.67 acres within its limits, but also in the limits of

prior grants. While the title to these lands, amounting to 8,540 acres remains in the company they should be charged against the amount the company is entitled to, and by so doing the deficiency above reported will be reduced to 377,227.83 acres as shown by the statement.

Attention is also called to the item "In limits but patented to other roads" under heading of "Chargeable to the grant" in the primary limits.

This item covering 34,436.43 acres is made up of 541.87 acres in the primary limits of the Oregon and California Railroad and the indemnity limits of the Oregon Central Military Road, and 33,894.56 acres in the conflicting primary limits of the grant under consideration and the Coos Bay Military Road grant.

As to the 541.87 acres in the conflicting limits of the Oregon and California Railroad and the Oregon Central Military Road, I have to say that they are in the primary limits of the former grant, opposite its definite location of March 26, 1870, and title passed by such definite location, so that when the indemnity withdrawal was ordered March 31, 1871, on account of the latter grant no right of selection passed thereunder and the approval of the lands for the Military Road was therefore erroneous and the lands should be charged against the *railroad* as part of its grant and against the Military Road as "Erroneously approved" to it.

Respecting the 33,894.56 acres in the conflicting limits of the Oregon & California Railroad and the Coos Bay Military Road, it appears that these lands were approved to the latter road under a decision of this office of January 8, 1874, holding that priority of right depended upon priority of definite location and not upon priority of grant.

This ruling was clearly erroneous, as was the approval of the lands to the Military Road, and they should therefore be made a charge against the railroad as a part of its grant and as in the case first mentioned

charged against the Military Road as "Erroneously approved."

In the examination other lands are charged as erroneously approved to the railroad because at the time the company's right attached by definite location or selection they had been otherwise disposed of and as to these lands shown by the statement to amount to 5,688.88 acres, rule has this day been laid upon the company to show cause, etc., under the act of March 3, 1887, *supra*, as to all lands not included in patented entries or demands made or suits instituted.

As to those lands falling within the limits of prior grants it will be observed that they are all charged in the body of the statement as "lost" to the grant, although as hereinbefore stated 1,576.67 acres of such lands have been patented to the Oregon & California Company and are charged against the amount the company is entitled to in the recapitulation, as are also the 6,963.33 acres reported as patented to the company outside of its limits.

Rule has this day been laid upon the company to "show cause," etc., as to the lands erroneously patented outside of its limits, but as to those erroneously patented to this company in the limits of prior grants, as well as those erroneously patented to other companies in the limits of this grant, as aforesaid, no rule will be laid, the companies being left to adjust the matter between themselves.

The statement of the result of the examination is herewith marked "A."

Very respectfully,

B. W. M.

BINGER HERMANN,
Commissioner.

"A."

Statement of Adjustment of the Grant for the Oregon & California Railroad Company by Act of July 25, 1866 (14 Stat., 239), Primary (20 miles), and Indemnity (30 miles) Limits.

PRIMARY (20 MILES) LIMITS.		
Whole area		3,821,901.80
CHARGEABLE TO GRANT.		
Properly approved	1,700,450.08	
Erroneously approved	2,346.33	
Listed and subject to grant	21,691.10	
Vacant and subject to grant	366,358.91	
Entries and filings on lands otherwise subject to grant	40.00	
Disposals after definite location	245.92	
Pending decision	3,410.59	
In limits, but patented to other roads	34,436.43	
Total chargeable in primary limits		2,128,979.36
LOST TO GRANT.		
By entries, filings, etc	1,476,768.69	
Limits Ore. Cent. Military Road	53,013.95	
Limits Corvallis & Yaq. Bay Wagon Road	57,130.16	
Limits Will. Val. Cas. Mt. Wagon Road	105,769.99	
Erroneously listed	239.65	
Total lost in primary limits		1,692,922.44
Making chargeable and lost equal area of grant		3,821,901.80

INDEMNITY (30 miles) LIMITS.

Total area		1,779,352 10

CHARGEABLE AS INDEMNITY.

Properly approved	798,185.20	
Erroneously approved	2,342.55	
Selected and subject to grant	82,204.97	
Pending decision	2,534.67	
Total chargeable as indemnity		885,267.39
Otherwise disposed of	472,197.49	
Vacant and subject to selection	421,887.22	
		894,084.71
Making chargeable, disposed of and vacant		1,779,352.10

RECAPITULATION.

(Basis of Chargeability.)

Area of primary limits		3,821,901.80
Chargeable in primary limits		2,128,979.36
Apparent loss in primary limits		1,692,922.44
Chargeable in indemnity limits		885,267.39
Apparent amount due under grant		807,655.05
N.B.—From the last amount should be deducted, because patented outside limits	6,963.33	
And because patented in limits of prior grants	1,576.67	
Total deducted for above reasons		8,540.00
Apparent amount yet due under grant		799,115.05
Vacant and subject to selection in indemnity limits		421,887.22
Apparent deficiency in grant		377,227.83

(Basis of Approvals.)

Area of primary limits		3,821,901.80
Actually approved, properly	2,498,635.28	
" " erroneously	4,688.88	
" " outside limits	6,963.33	
" " other limits	1,576.67	
Total actually approved		2,511,864.16
Actually due under grant		1,310,037.64

Office Supreme Court U. S.
FILED
MAR 3 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

OREGON AND CALIFORNIA RAILROAD COMPANY, appellant,
v.
THE UNITED STATES, APPELLEES. } No. 186.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEES.

In the Supreme Court of the United States.

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THE UNITED STATES, APPELLEES. } No. 186.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEES.

The opinion of the trial court and the cases cited by the court of appeals do away with the necessity for an extended brief. The Northern Pacific, Southern Pacific and other grants show that, in the view of Congress, occupancy by homestead settlers constitutes in the case of unsurveyed lands, a "claim or right" and a "disposal" of the lands. See *Nelson* v. *Northern Pacific.*

Our grant is similar, being one affecting the unsurveyed, almost unexplored northwest. It grants public lands and expressly denies that it grants lands "granted, sold, reserved, *occupied by homestead settlers*, preempted or *otherwise* disposed of." Indemnity lands were to be

obtained from "public lands, not mineral." It would seem to be a reasonable construction of this particular grant that "lands occupied by homestead settlers" were not to be taken as indemnity lands.

The lands in question were such lands when the appellant sought to get them as indemnity lands. Congress did not intend, however, to protect homestead settlers in the *place* limits and allow the company to dispossess them in the *indemnity* limits.

Much stress is laid by counsel upon the alleged fact, which they pretend to prove by testimony from their own land books, that at the time of the granting act and definite location of the road they lost in the primary limits of the grant so many tracts of land that at the definite location of the road they became entitled to all of the lands at that time free for selection within the indemnity limits. The theory is that no selection was necessary in this case, because, being entitled to the whole, there was no occasion for selecting among the tracts available.

We contend that the alleged fact is not proven, and also that the necessity for selection, as in other cases, would remain, even if it were.

The fact is not proven, for appellant has mistaken the law in attempting to make the proof. They evidently relied upon the Dunmeyer case. Their witnesses undertook to show the loss in the primary limits, and also the fact that lands were not free within indemnity limits by merely showing homestead and preemption filings or donation notifications *of record*

and *uncanceled* at the date of the grant or at the date of the filing of the map of definite location. (See Record, p. 82.)

Up to the time of the Dunmeyer decision (113 U. S., 629), railroad companies were allowed to take, as falling into the grant, all tracts as to which there were homestead and preemption claims which were abandoned after the definite location of the road. That case held that this was wrong, and that it was enough that the claims were of record at the time of definite location, since that determined what the company took and what the company did not take in the primary limits. Since then, however, the court has made it clear that the intention of the Dunmeyer case was that the company should lose in the primary limits only those tracts as to which, at the date of the definite location, there were claims under the homestead, preemption, and other laws, which were existing claims and not mere records. Thus it was held in *Northern Pacific Ry.* v. *DeLacey* (174 U. S., 622) that the railroad company took the land claimed by the individual claiming under the preemption law, because there had been a cancellation of the individual claim, not as a matter of fact, but by operation of the law which allowed the preemptor so many months in which to make proof and payment.

It necessarily follows that the pretended proof that so many tracts were lost at the date of definite location, amounting to no more than testimony intended to show that there were filings on record, amounts to nothing

at all. The same remark applies to similar proof that in the indemnity limits only so many tracts were at that time open to selection.

But even if the proof were satisfactory, the logical conclusion that no selection was necessary because the company was entitled to all the lands in the indemnity limits not taken up at the time of definite location is unsound, when we consider that the lands within the indemnity limits remained open to homestead and preemption without regard to whether a sufficient amount would be left for the company or not. (*Southern Pacific* v. *Bell*, 183 U. S., 689.)

The logical mistake made in this matter is the assumption that a grant of a definite quantity is made. What is granted is the unoccupied place lands at the time of definite location, whether many or few, and in addition the right to select and obtain unoccupied indemnity lands, whether many or few at the time of selection.

The opinion of the lower court in this case gives another reason why the proposed theory should be regarded as erroneous.

It is a theory particularly inapplicable in this case, it seems to us, because the lands in the place and indemnity limits, even at this late day, do not seem to be all surveyed lands. They certainly were not, to any great extent, surveyed when the road was definitely located. If it now turns out, therefore, that there was a deficiency of lands at the time of the definite location, or if it shall so turn out when the surveying is completed and the selecting and approving of

lists is completed, the fact was certainly unknown and unknowable when the settlements here in question were made upon these lands, and it would be singularly unjust to deprive these individual claimants of rights by working back any such theory as that proposed to the time of their settling in good faith and living and building and working upon these unsurveyed lands in the indemnity limits.

The brief of the appellant contains quotations and citations which we are very glad to have submitted to the discrimination of this court.

The monstrous doctrine that there is one law between individuals and another law between individuals and railroad companies is original with counsel. His quotations and citations in no way support it.

It is pleasant to know that equality prevails between railroads, as per the quotation from *St. Paul Railroad* v. *Winona*, without regard to the lengths of the roads or relative capitals invested.

The first part of the brief is taken up with quotations concerning surveyed lands, that is, lands as to which records could and were required to be made within thirty days in preemption cases and immediately in homestead cases, and to a misuse of the case of *Tarpey* v. *Madsden*, which is the one upon which we principally rely; for it holds that *settlement* before definite location, where no declaratory statement could be filed, would take land out of the place grant if stated *after* definite location in the declaratory statement as occurring prior to such definite location.

That decision and *Nelson* v. *Northern Pacific*, holding, in the case of unsurveyed *place* lands, that *settlement* in 1881 prior to definite location in 1884, there being a survey and application to file in *1893*, long after definite location, gave the settler the land, seem to leave little to be said in this case. Substitute selection, even as understood by appellant, for definite location, which he concedes we should do, and what is left of his argument?

One overworked quotation is from the case of *St. Paul and Pacific* v. *North. Pac.* (139 U. S., 1), relied upon by the other side as showing that where there is a deficiency of indemnity lands to make up losses, no selection is necessary. There the court was considering whether the failure to select, under those circumstances, was a ground in itself for refusing to decide for the plaintiff as to indemnity lands, among others, where there was nothing else to interfere with its rights. The lands were and remained withdrawn from sale by express statutory provision and no individual rights were involved in the controversy. The other company having no rights whatever in the indemnity area, as held by the court, it did not lie in its mouth to raise the question whether the lands had been selected or not. The decision of the case turned on other questions between the two railroad companies, and what is quoted on this point of there having been no selection should be confined to the case then decided and similar cases. The court did not intend to say, and there was no occasion for it to consider, whether

as against the claims of those, not parties to that suit and therefore not affected by the decision, based upon settlements or other acts in an indemnity area, the mere deficiency of lieu lands at the time of definite location gives the company a title to all the lieu lands at that time unsettled.

So as to the case of *Tarpey* v. *Madsden* (178 U. S., 215). There the question was whether, the railroad having been located in 1868 and an individual, after the land office existed, made a declaratory statement to the effect that he had settled in 1869, a third person could long afterwards show by parol that this was not so and that the settlement was really prior to 1868. The court held that he could not, but said: "If Olney was in possession of this tract before October 20, 1868, with a view of entering it as a homestead or preemption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such a way as to protect his rights." In other words, his rights dated from settlement, and so antedated the definite location, but as he made a different record when the land office was opened, a stranger could not be heard long after to say that Olney's settlement was other than he had said it was. The record, going back to the settlement as he declared it, was held controlling, under those circumstances, on the principle that Congress desired something like certainty in railroad grants, and therefore that the record,

rather than matter in pais, should be consulted to ascertain them. The same seems to be the desire of Congress as to homestead and preemption and other claims; hence the requirement of declaratory statements and filings in homestead and preemption claims. But all this is consistent with the various inceptions of titles—of railroads to place lands at the moment of filing a map of location; of the railroads to indemnity lands at the moment of selection, under the direction of the Secretary—that is, of his approval; of individual homesteaders and preemptors at the moment of settlement.

Here there was not a lack of a local land office, but an equivalent thing—the office was not open to settlers on unsurveyed land.

The theory of the brief of appellant is ingenious, but attaches too much importance to the maxim, which is chiefly useful where other principles are inapplicable, that he who is first in time is stronger in right.

Counsel seek to show a right in the individual claimants and a right on the part of the land company—to show that these two were equal or balanced—and then to deduce that, because the company filed its selection list before the homesteader filed his claim, after the plat of survey was ready, the company took the title to the particular tracts. Their idea seems to be that the right of selection was a float so long as the plat of survey was not filed, and that the right of the individual homesteader or preemptor was a float, or something of the kind, and that they were in the position

of two companies having rights of selection within the same belt, so that the first to put a claim of record should prevail.

We do not understand, however, that the matter is quite so simple and the equality quite so clear.

What the company had in this case was not a title, inchoate or other, to the particular tracts in question. It had less rights to the particular tracts in question than a qualified preemptor who had not settled upon them. It had a right upon the ascertainment of certain deficiencies in the primary limits, which the Secretary of the Interior would ascertain with due deliberation and consideration of the condition of the lands there, to go into a large belt of country and suggest to the Secretary that it was entitled to so many tracts of lieu lands, whereupon the Secretary would inquire what lands in that belt could or should, all things considered, be given to the company, and especially whether any particular tracts that might be suggested by the company could be so given.

The language in our grant, "shall be selected by said companies under the *direction* of the Secretary of the Interior," is, we submit, no more or less than the language in other grants "it shall be the duty of the Secretary of the Interior to cause to be selected." See the grant made on the day following the date of ours, July 26, 1866, to the Union Pacific Southern Branch. In other words, the effective thing is not what the company suggests, but what the Secretary does. The duty of selecting is his duty. His action and nothing

else fixes the beginning of the company's title to a particular tract of indemnity land. To choose what another "directs" to be chosen is for that other to do the choosing, or it is nonsense. The granting laws say nothing about any lists to be submitted to the Secretary. They are submitted for convenience and without any recognition from the law. The Secretary could select without them if he preferred. They give the company no right whatever, by relation or otherwise, and the tracts to be selected are not even identified by them. (*Wisconsin Central Railroad Co.* v. *Price Co.*, 133 U. S., 496.)

The individual preemptor, however, did not start out with a vague thing like this. If lands were not occupied, he had a right, without regard to the Secretary, to go and settle upon a particular tract, inhabit it, build upon it, and acquire it for his home by complying with certain fixed requisites; so as to the homesteader. These people in our case were not only able to, but had done all these things in the way of settlement, dwelling, and building.

It would be tedious to go over the different laws of Congress which recognize the substantial rights of such persons from the time they take (R. S., 2268) "the initiatory steps required by law in regard to actual settlement;" and it would be quite tedious to go over the various decisions of this court recognizing such substantial rights and inchoate or inceptive *titles* to the *particular tracts* settled upon.

In this case, as conceded in the brief of counsel, the

legal title would not pass to the company until selection and approval thereof. Such selection and approval are likened by counsel to a definite location of place lands, such as were under discussion in the case of *Nelson* v *Northern Pacific Ry. Co.*, in which the difference between the rights of a settler upon surveyed and unsurveyed lands are discussed. The court there says:

> Nor is there any conflict between the decision now rendered and *Northern Pacific Railroad* v. *Colburn* (164 U. S., 383); for, as appears from the opinion and record in that case, the land there claimed to have been occupied by a homestead settler, at the date of definite location, was *surveyed* public land, and the good faith of the occupation was not manifested by an entry, or an attempt at entry, at any time in the local land office. It was held that the inchoate right of the homesteader must be initiated by a filing in the land office. In the present case, as we have seen, the land occupied was unsurveyed, and at the time of such occupancy, the land being unsurveyed, there could not then have been any filing or entry in the land office.
>
> The case before us is altogether different. Nelson's occupancy occurred after the passage of the act of 1880. * * * The act of 1880, in its application to public lands which had not become already vested in some company or person, must be held to have *so modified the order of withdrawal, based merely on general route, that such order would not affect any occupancy or settlement made in good faith, as in the case of Nelson, after the passage of that act and prior to definite location.*

This referred to place lands, where the definite location gives the fee to the company. Counsel in our case treat selection as the equivalent of definite location. Here *settlement* on unsurveyed land preceded selection, even if we regard the filing of lists by the company as selection.

If the theory of counsel that no rights are acquired by homesteaders and preemptors on unsurveyed lands, which they were authorized by express statutes (as in the case of lands in Oregon) to acquire under the homestead and preemption laws, is to be upheld, then the laws referred to were a fraud upon the citizens of the country.

Citizens were invited to settle, to cultivate, to inhabit, to build, and to improve unsurveyed lands, and were told that after the plat of survey should be filed they would have six months (or, as it was afterwards made, three months, instead of the ordinary thirty days) in which to file their claims.

The natural and reasonable meaning of this was, not that they were persons without right, squatting upon the lands, but that they were to have rights of a substantial character, and that they were to be exclusive rights, to be lost only by their own negligence in not filing claims within six or three months after it became practicable to file them—that is to say, to describe the lands as they were required to do, which could only be done after the public surveys had been platted and filed.

They did not understand that they were so without

right as against others that they must file their claims on the very day of the filing of the survey plat or lose their homes, with all the labor, time, and money.

Such of them as were within the railroad indemnity limits, where they were authorized to be, naturally and properly understood that the three months constituted a period within which the rights of the railroad company were excluded, and after the expiration of which the rights of the railroad company should attach, notwithstanding their claims, so that they would be thereafter certain on the records.

If Congress did not mean this, it set a trap for these people, to make them hewers of wood and drawers of water for the benefit of the railroad companies employing attorneys in Washington to telegraph them on what day the plats would be filed in the local offices, so that they might procure advance copies of the place-land surveys, list lands among those, and list proposed indemnity lands, and by a sudden move acquire the homes of the settlers.

Congress had no such intention. We find from the report of the Committee on Public Lands of March 17, 1880, that this matter of telegraphing from Washington did not escape the attention of Congress in passing the act of 1880. In speaking of relinquishments and cancellations the report says:

> Under the present system, in very many instances, a party after buying the improvements and paying several hundred dollars therefor, is unable to enter the land by reason of the fact

> that some other party desiring to enter same procures the assistance of an attorney in Washington City, who telegraphs him information when cancellation is made.
>
> * * * * *
>
> Under the present system a party who desires to contest and procure the cancellation of an entry is compelled to pay all expenses for same, made by himself or the claimant, and after doing so is often defeated in securing the land by reason of not being the first legal applicant. This bill proposes to secure to such contestant a reasonable time in which to make such entry.

It can not be that Congress had any other thought in allowing homesteaders three months in the act of 1880, than that they should have three months to find out that the plat had been filed, to find out on what particular surveyed tract they lived, to draw up papers which would properly describe the tract, and to make the filings, which would by no means be the initiatory steps of their proceedings, but rather the completion of them, and this without being cut off by intervening claimants. That act expressly says that the claimant's right shall relate back to the date of settlement, the same as if he settled under the preemption laws.

For what purpose could it be said that this right should relate back to the time of settlement, except to prevent his losing the land by a scheme of some intervening claimant of one kind or another?

The act of 1880 was itself a grant of title to persons

who should act under it. They were invited to settle, if they had not already done so, and were told that they should have the land in case they should perfect their original titles by filing applications, etc., within a certain time after the doing so became possible. These people in this case settled, accordingly, or relied (if they had already done so, and the act speaks of those who had settled or should settle) upon that promise. They did so in good faith, expended large sums of money—probably all they accumulate to spend—twenty years of their time and labor in some cases. Now they are told that that was all for the benefit of the railroad company, unless they hung about the land office all day and every day with a complete set of papers they could not prepare, to be thrust in sooner than the railroad company, with its vast interests, its lawyers, and agents, could submit its suggestions, not to the Secretary of the Interior, who was to consider them, but at the same local land office.

If this is the law it ought not to be the law, and the presumption is that Congress enacts laws in a spirit of justice and with some wisdom.

The law ordinarily favors diligence; but when we consider all that was necessary to be done and found out to enable the appellant to make lists of surveyed tracts lost in place limits and of tracts intended to be selected as free public land in the indemnity limits, in order to be able, on the very day the survey plats were filed, to put in its lists in the local land office and then rushed through the approval and patenting, in

order to get the advantage of the settlers and turn them out of their homes, well, we have here diligence of a kind that a court of equity will be slow to encourage.

Respectfully submitted.

CHARLES W. RUSSELL,
Special Assistant Attorney-General.

O

Supreme Court of the United States.

No. 186.—October Term, 1902.

The Oregon and California Railroad Company, Appellant, *vs.* The United States.	Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[April 6th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

By the act of Congress of March 3d 1887, c. 376, it was provided that if, at the completion of the adjustments of land grants thereby directed to be made, or sooner, it appeared that lands had been from any cause erroneously certified or patented to or for any company claiming by, through or under grant from the United States to aid in the construction of a railroad, it should be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if the company did not reconvey within ninety days after demand made, it should thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel the patents, certification or other evidence of title theretofore issued for the lands, and to restore the title thereof to the United States. 24 *Stat.* 556, *c.* 376.

In *United States* v. *Missouri &c. Railway*, 141 *U. S.* 360, 380, 382—which was an action brought by the United States after the passage of the above statute to have certain patents for land cancelled—this court, after observing that as to some of the lands the United States appeared to have a direct interest in them, said: "As to others, it is under an obligation to claimants under the homestead and pre-emption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title, by the patents in question, and thereby enable it to properly administer these lands, and to give clear title to those whose rights, under those laws, may be superior to those of the railway company. A suit, therefore, to obtain a decree annulling the patents in question, so far as it is proper to do so, was required by the duty the Government owed as well to the public as to the individuals who acquired rights, which the patents, if allowed to stand, may defeat or embarrass." Reference was made in that case to *United States* v. *San Jacinto*

Tin Co., 125 *U. S.* 273, 286, in which it was held that the United States could sue to set aside a patent improperly issued, where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own; also, to *United States* v. *Beebe*, 127 *U. S.* 338, 342, in which it was held that patents procured by fraud could be cancelled at the suit of the United States where that was necessary to be done in order that it might fulfill its obligations to others. The court then observed: "These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice." See also *United States* v. *Oregon &c. Railroad Co.*, 176 *U. S.* 28.

In this state of the law, the present suit was brought by the United States against the Oregon and California Railroad Company in order to obtain a decree cancelling certain patents for lands, which, it was alleged, had been illegally and by mistake issued in the name of the United States to that company, which succeeded to the rights of the Oregon Central Railroad Company.

The case was heard upon a stipulation as to evidence, from which the following facts appear:

By the act of Congress of July 25th 1866, c. 242, 14 *Stat.* 239, the California and Oregon Railroad Company, and such company organized under the laws of Oregon as the Legislature of the latter State designated, were authorized to locate, construct and maintain a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad Company in California.

For the purpose of aiding in the construction of that line, Congress granted to those companies, their successors and assigns, every alternate odd-numbered section of public lands, not mineral, to the amount of twenty sections per mile, (ten on each side,) of the railroad line. But the act provided that when any of the alternate sections or parts of sections should be found "to have been granted, sold, reserved, *occupied by homestead settlers*, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said *first-named* alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein *granted* on each side of said

railroad, so far as located and within the limits before specified. . . Settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding."

The Oregon Central Railroad Company was designated by the Oregon Legislature as the company organized under the laws of Oregon, entitled to receive the granted lands in Oregon, and the benefits and privileges of the above act of 1866.

Prior to October 1869 that company definitely fixed on the ground and surveyed the first section of the railroad in Oregon. That section extended from Portland to Jefferson, and comprised not less than sixty continuous miles from the northern terminus of the road; and on October 25th 1869 the company filed in the office of the Secretary of the Interior, and on January 29th 1870 the Secretary duly accepted and approved, a map of the survey and definite location of that section.

During the year 1869 and the months of January and February 1870 the company definitely fixed on the ground and surveyed the second section of its road, which section comprised not less than 124 continuous miles from Jefferson; and on March 26th 1870 filed in the office of the Secretary, and on March 29th 1870 that officer accepted and approved, a map of the survey and definite location of that section.

On the 7th of April 1870 the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, withdrew all the odd-numbered sections of land lying within thirty miles on each side of the railroad (as shown on the map of survey and definite location filed with the Secretary on March 26th 1870) from sale or location, pre-emption or homestead entry; and that withdrawal remained continuously thereafter in force, except so far as, if at all, it was affected by an order of the Secretary made August 15th 1887, revoking the order of April 7th 1870, as to the odd-numbered sections lying within the *indemnity* limits of the grant made in 1866, and declaring the odd-numbered sections, lying within such *indemnity* limits, to be restored to the public domain, subject to pre-emption and homestead entry, as well as to the provisions of the above grant. The lands so withdrawn April 7th 1870 were within the jurisdiction of the district local land office at Roseburg, and notice of such withdrawal was received at that office on April 25th 1870.

During the years 1868 and 1869, and prior to December the 25th 1869, the Oregon Central Railroad Company constructed and fully equipped the first twenty miles of the railroad contemplated by the act of 1866, commencing at Portland and extending along the line shown upon the map filed in the office of the Secretary of the Interior on October the

29th 1869. And in the years 1869 and 1870, and prior to September the 1st 1870, the above two companies fully equipped the second twenty miles of the railroad, commencing at the end of the first constructed twenty miles and extending along the line shown on the map to a point distant forty miles from the commencement of the railroad at Portland—a portion of the second twenty miles having been constructed by the Oregon Central Railroad Company, the remainder by the defendant.

The whole line of railroad contemplated by the act of 1866, commencing at the end of the second constructed twenty miles, was constructed by the defendant company during the years 1870, 1871 and 1872; and prior to December the 4th 1872 the entire line from Portland to Roseburg was continuously operated for all the purposes contemplated by Congress.

Commissioners were appointed by the President to examine the railroad as constructed from Portland to Roseburg. That duty was performed, and they reported to the President, under oath, that the railroad between those points had been completed and equipped in all respects as required, and was ready for the service contemplated by the act of 1868. Those reports were duly accepted and approved by the President. The report as to the seventh, eighth and ninth sections, including the last seventy-eight miles of the road from Portland to Roseburg, was made on July 10th 1878, and the next day was accepted and approved.

The remaining part of the road in Oregon, extending from Roseburg to the southern boundary of that State, was constructed, fully equipped and made ready by the defendant company during the years 1878 to 1889, inclusive, and all prior to the year 1900. It was duly examined by commissioners who reported thereon, and their reports were accepted and approved.

All the lands described in the bill of complaint are distant more than twenty miles from but lie within thirty miles on one side of the road extending from Jefferson to Roseburg, shown on the map filed March 26th 1870; and they were all included and embraced by the withdrawal made by the Secretary on the 7th of April 1870.

No part or portion of the lands described in the bill of complaint are mineral lands, nor are they included by any exception or reservation from the indemnity land grant in Oregon, made by the act of 1866, except so far as, if at all, they were excepted or reserved therefrom by reason of the settlements and facts hereinafter to be referred to.

On August 16th 1892 all the lands described in the bill were free and clear for selection by the defendant company as part and parcel of the *indemnity* lands granted by the act of Congress, except so far as, if at all, they were excepted or reserved by those settlements and facts.

On the 16th of August 1892 and the 19th of October 1892 the defendant company filed with the register and receiver of the United States

Land Office at Roseburg its several lists selecting the lands in question as indemnity lands in lieu of lands of equal area, parts of odd-numbered sections within the primary limits of the grant made in 1866 and otherwise disposed of by the United States prior to the passage of that act. Those lists were accompanied by the fees, costs and charges required by law, and in all respects conformed to the directions, rules, regulations and requirements of the Secretary of the Interior and of the Commissioner of the General Land Office. They were severally approved and certified by the register and receiver, and the defendant company had not then, nor has it subsequently, selected or received lands in lieu of those therein described as the basis of selections by it made, other than the lands so selected by said lists.

In the following years the following persons, each being a duly qualified entryman under the homestead laws of the United States, settled upon the lands respectively claimed for them in this suit, to wit: 1869, Louis [Charles] Heller; 1878, J. R. Peters; 1878, John Sapp; 1882, George C. Peck; 1883, Uriah W. Wren; 1885, Baxter W. Jenkins; 1885, Charles E. Barton; 1888, Joseph A. Cox; 1889, Charles W. Seeley; 1889, John W. Carey; 1890, F. W. Huddleston; 1890, Alfred R. Young; 1890, Abraham M. Peck. Each person made his settlement with the intention of making a homestead entry of the lands, whenever that could be done under the acts of Congress. After the date of settlement each settler continuously resided and made improvements upon his land in the way of a dwelling house, barn, outhouses, fencing, clearing and planting of trees. And on October 27th 1892, within ninety days after the official plat of the survey of the lands was filed in the United States Land Office at Roseburg, each settler, in good faith, filed a formal application in the land office for a homestead entry of and for the lands upon which he settled and improved and upon which he continuously resided after the date of his first occupancy.

On the 20th of February 1893 the Commissioner of the Land Office and the Secretary of the Interior having approved the selections made by the railroad company, a patent was issued conveying to it all the lands in dispute. But when the company's lists were approved neither the Commissioner nor the Secretary had any knowledge of the adverse claims of the above settlers to the lands upon which they respectively resided, and which the United States now claims for them.

On the 27th day of October 1893 the land grant made by the act of 1866 being still unadjusted, the Commissioner of the Land Office demanded of the railroad company a reconveyance of the lands covered by the patent of 1893 upon the ground that the patent to it had been erroneously issued. The company refused to reconvey, and claims to be the owner of such lands. Hence the present suit to have that patent cancelled.

The Circuit Court, upon final hearing, found the equities of the case to be with the United States, and a decree was entered cancelling the patent issued to the Oregon and California Railroad Company. That decree was affirmed by the Circuit Court of Appeals.

1. Some of the questions referred to in argument as bearing upon the issues presented by the record have been determined by decisions of this court rendered since this litigation commenced.

In *Hewitt* v. *Schultz*, 180 *U. S.* 139, which related to the grant of lands made to the Northern Pacific Railroad Company, by the act of July 2d 1864, c. 217, (13 *Stat.* 365,) this court accepted the construction of that act as adopted and adhered to by the Land Department, and held that the Secretary of the Interior had no power, simply upon the *definite location* of the Northern Pacific Railroad, to withdraw from the operation of the pre-emption and homestead laws lands within the *indemnity* limits of the road as defined by Congress. *Northern Pacific Railroad Co.* v. *Miller*, 7 *L. D.* 100, 125; *Northern Pacific Railroad Co.* v. *Davis*, 19 *L. D.* 87, 90. In the present case, the line of the railroad, opposite to which are the lands here in dispute, was definitely located in 1870, while (with the exception of one tract, about which the railroad company makes no question) the lands in dispute were not settled upon until after that year. We have seen that upon acceptance of the map of definite location the Secretary of the Interior, according to the stipulated facts, made an order (which was duly received at the local land office) withdrawing all the odd-numbered sections within thirty miles on each side of the road shown on the map of survey and definite location, from sale or location, pre-emption or homestead entry. That withdrawal included the odd-numbered sections in the indemnity limits, within which the lands in dispute were situated. We hold on the authority of *Hewitt* v. *Schultz* that it was beyond the power of the Secretary to make such an order in respect of lands within the indemnity limits of the grant made by the act of 1866. The reasoning in that case, touching this proposition, applies to the case now before us. In 1887 the Secretary, as if to remove the apparent obstacle placed in the way of pre-emption and homestead settlers created by the order of 1870, made an order revoking the previous one of withdrawal so far as it related to indemnity limits, and declaring the odd-numbered sections lying within the entire indemnity limits of the grant restored to the public domain and subject to pre-emption and homestead entry, as well as to the provisions of the act of 1866. We need not discuss here the question of the power of the Secretary of the Interior to revoke an order of withdrawal once legally made and notice thereof given at the local land office. It is sufficient to say that the railroad company did not by the order of 1870, relating to lands within the indemnity limits, acquire an interest in any particular odd-numbered sections within those limits; nor did that order prevent the

bona fide occupancy by settlers of odd-numbered sections *within such limits* up to the time of the approval of selections made by the railroad company of lieu lands to supply any deficit in the place limits.

In *Nelson* v. *Northern Pacific Railway*, decided at the present term of the court, it was held that the act of 1864 making a land grant to the Northern Pacific Railroad Company, and the act of May 14th 1880, c. 89, for the relief of settlers on the public lands, recognized the right at any time prior to definite location to settle upon the unsurveyed public lands embraced by the grant of 1864, notwithstanding there was, at the time, in existence an order of withdrawal, based only upon a map of general route not issued pursuant to any express direction of Congress; provided such settlement was accompanied by residence on the land, in good faith, with the intention on the part of the settler to avail himself of the benefits of the homestead law as soon as the lands were surveyed. This decision rested mainly on the ground that Congress intended by the act of 1864 to protect the rights of *bona fide* settlers acquired before the railroad company had, by an accepted map of definite location, obtained a vested interest in particular odd-numbered sections granted.

These principles are applicable to the present case if, as contended by the United States, the railroad company did not acquire, and could not have acquired, an interest in specific sections of lands within the *indemnity* limits before their actual and approved selection, under the direction of the Secretary prior to the date of occupancy by the respective settlers.

2. We have seen, from the stipulated facts, that it was not until 1892 that the railroad company made its selection of lands within the indemnity limits to supply deficiencies in its place or granted limits. But this occurred after each one of the entrymen, whose rights the Government is now seeking to protect, had made his settlement with the intention to follow it up by a *bona fide* entry under the homestead laws. In other words, the lands were "occupied by homestead settlers" (to use the words of the granting act of 1866) at the time they were selected by the railroad company. Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make. In *Ryan* v. *Railroad Company*, 99 *U. S.* 382, which was a contest as to lands within the indemnity limits, this court said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had

not and could not have any claim to it until specially selected, as it was, for that purpose." And the reason given was that "when the road was located and the maps were made, the right of the company to the odd sections first named became fixed and absolute. With respect to the lieu lands, as they are called, the right was only a float, and attached no specified tracts until the selection was actually made in the manner prescribed." In *St. Paul Railroad* v. *Winona Railroad*, 112 *U. S.* 720, 731, the court, referring to this principle, said: "The reason of this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles on each side of the road—until these sections are ascertained and identified by a legal location of the road—so in regard to the lands to be selected within a still larger limit their identification cannot be known until the selection is made. It may be a long time after the line of the road is located, before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss." After observing that twenty years expired in that case after the location of the road before any selection of lieu lands was made, the court added: "Was there a vested right in this company, during all this time, to have only those lands but all the other odd sections within the twenty-mile limits, on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the Government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, or forbidden to cultivation?" To the same effect are the following cases: *Grinnell* v. *Railroad Co.*, 103 *U. S.* 739; *Cedar Rapids Railroad* v. *Herring*, 110 *U. S.* 27; *Kansas Pacific* v. *Atchison Railroad*, 112 *U. S.* 414, 421; *Sioux City &c. Railroad* v. *Chicago &c. Railroad*, 117 *U. S.* 406, 408; *Barney* v. *Winona &c. Railroad*, 117 *U. S.* 228, 232; *Wisconsin Railroad* v. *Pierce County*, 133 *U. S.* 496, 508, 513; *Nelson* v. *Northern Pacific Railway*, above cited. Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary.

3. But it is contended that as the selection by the company (except as to the tract which was occupied in 1869, before any selection by the company of lieu lands) was prior to the application by the respective settlers for entry under the homestead laws, its right to the lands in question was superior to that asserted by the settlers. This view is completely met by the fact that the settler, by prior occupancy in good faith, could avail himself of the homestead acts whenever, by an official survey, the way is opened by the

Government for him to do so, and by the fact that, within ninety days after these lands were surveyed, he filed in the proper office his application to enter them under the homestead laws of the United States. He moved with due diligence to protect and perfect the right acquired by his occupancy of the land with the intention to avail himself of the benefit of those laws. That right was not to be affected or impaired by the fact that the lands were not surveyed at the date of occupancy. *Nelson* v. *Northern Pacific Railway*, above cited; *Ard* v. *Brandon*, 156 *U. S.* 537, 546; *Tarpey* v. *Madsen*, 178 *U. S.* 215, 219. In the *Ard* case the court said: "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon the application." In the *Tarpey* case it was said that "the right of one who has actually occupied [public lands], with intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent;" that if a settler was in possession before definite location, "with a view of entering it as a homestead or pre-emption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a land office, he could, undoubtedly, when such office was established, have made his entry or declaratory statement, in such way as to protect his rights." So, if the condition of the lands, being unsurveyed, prevents the making by a *bona fide* occupant of a proper application of record to enter them under the homestead laws his rights will not be lost, if, after the lands are surveyed, he applied in due time to enter the lands under those laws. And such has been held to be the object and effect of the act of May 14th 1880, *c.* 89, 21 *Stat.* 140. We could not otherwise adjudge in this case without holding that the mere selection of the lands by the railroad company displaced or destroyed the rights of a *bona fide* settler arising from previous occupancy with the intention of making the required homestead entry whenever he was permitted to do so. We cannot so hold. We adjudge that the rights which *bona fide* occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company—the settler having, after the lands were surveyed, promptly taken the necessary steps to protect his rights under the homestead laws. And in such case, the entry made under those laws, relates back to the date of settlement on the lands. It was so substantially held in *Nelson* v. *Northern Pacific Railway*, above cited.

4. It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition

prior to definite location by sale and otherwise of lands within the granted limits. But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant of lands in respect of place limits. In any event, no such adjustment having taken place prior to the date of the settler's *bona fide* occupancy, his rights, based upon such occupancy, would not be affected by the fact, subsequently appearing, in whatever way, that all the odd-numbered sections within the indemnity limits were needed to supply deficiencies in place limits. At the time the settler went upon the land, in good faith, to make it his home and to perfect his title under the homestead laws, there was nothing of record that stood in the way of his right to occupy the lands and to remain thereon until he could perfect his title by formal entry under the homestead laws.

Other points were made in the argument of the case, but they need not be specially noticed, as what we have said requires, independently of those points, an affirmance of the decree of the Circuit Court and the Circuit Court of Appeals.

The decree is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.